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IN THE

Supreme Court of the United States

October Term, 1948.

BENNETT E. MEYERS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

ROBERT T. BUSHNELL,
17 East 63rd St.,
New York 21, N. Y.,
Attorney for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully represents that he was convicted on March 12, 1948, in the United States District Court for the District of Columbia upon an indictment under the District of Columbia Code, Section 22-2501, for subornation of perjury, alleged to have been committed in Washington before a subcommittee of the Special War Investigating Committee of the Senate on October 4 and 6, 1947, the said subcommittee being alleged in the indictment to have been a "competent tribunal" within the meaning of the statute. He now brings this petition for a writ of certiorari to review a judgment of the Court of Appeals

for the District of Columbia entered November 8th, 1948, confirming the judgment of the District Court (*Bennett E. Meyers, Appellant,* v. *United States of America, Appellee,* No. 9797).

Questions Presented.

The questions arising on this record are:

1. Whether the petitioner was deprived of due process of law and of his right to a fair and impartial trial by the manner in which his case was conducted and permitted to be conducted by the District Court Judge.

2. Whether three Senators meeting as an alleged subcommittee of the Special Senate War Investigating Committee, were a "competent tribunal" within the meaning of the perjury statutes when (a) the alleged subcommittee was created by the Chairman of the full committee, without vote or authorization of the full committee; (b) when all three Senators were appointed by the Chairman of the full committee without vote or authorization by the full committee and two of the Senators without announcement to, or knowledge of, the full committee (c) when at the time of the attempted appointment of two of the three Senators to membership on the full committee there were no vacancies on the said committee.

3. Whether perjury alleged to have been committed before Congressional Committees in Washington, is a matter of national or federal concern which must be prosecuted under the Federal Criminal Code.

4. Whether the decision of the court affirming petitioner's conviction is, as found by Judge Prettyman, a "*departure from the basic principles that conviction can be had only upon proof of the acts alleged in the indictment.*"

5. Whether the majority opinion of the Court of Appeals does not on its face show reversible error when admittedly there was no "competent tribunal" on at least one of the dates alleged in the indictment.

Summary Statement of the Matter Involved.

This indictment returned by the Grand Jury for the District of Columbia, December 19, 1947, followed within a month the termination in November of extensive public hearings by the alleged subcommittee which were attended, as matter of common knowledge, by an intense and adverse publicity campaign which made petitioner, in the space of a few weeks, throughout the United States, an object of prejudice, hatred and contempt. Petitioner was arraigned on the indictment on January 7, 1948, was ordered to trial on February 24, 1948, convicted on March 12, 1948, sentenced on March 15, 1948, and forthwith committed to jail where he has since remained, having been denied bail pending appeal.

Applicant's appeal to the Circuit Court of Appeals was argued on June 14, 1948. Decision was finally handed down by a 2-1 majority on November 8, 1948, Judge Prettyman filing a dissent that he was of "strong opinion" that the judgment should have been reversed on the two grounds considered by him, namely, that (a) the basic testimony of Lamarre, which defendant was alleged to have suborned, was presented to the jury upon the trial in so unfair and prejudicial a fashion as to constitute reversible error and that the procedure permitted by the trial judge *"lacked the minimum elements of fair play essential to our concept of fair trial"* (R. 573), and that (b) Defendant should have been acquitted by order of the court because the evidence did not support the allegations in the indictment and the decision below was a *"departure from the basic principle that conviction can be had only upon proof of the acts alleged in the indictment."* (Italics ours.) (R. 584.)

The indictment specifically describes in three counts the alleged perjuries claimed to have been committed by Lamarre and states that they were committed on October 4 and October 6, 1947. It makes no distinction between the two dates, both being alleged in all three counts. The meet-

ings on October 4 and October 6, 1947, were in secret or executive session and a complete transcript of Lamarre's testimony on these dates was in possession of the Government.

Motion was made before trial on behalf of defendant to inspect the transcript of the stenographically reported testimony of Lamarre before the alleged subcommittee which the indictment alleged to have been perjured and which the defendant was charged with suborning. (R. 12, par. 3.) The motion was opposed by the Government on the ground that the "*Matter sought on dates October 4 and 6, 1947, transpired in Executive Session and therefore confidential to the Committee.*" This transcript consisted of 315 typewritten pages the accuracy of which was unquestioned. (Gov't answer, par. 3(c), R. 14.) The court denied the motion for the inspection of this essential testimony on February 2, 1948.

At the trial the government, instead of offering the transcript of Lamarre's testimony to which defendant had been denied access and upon which the present indictment was based, called as its principal witness, Mr. William P. Rogers who had been counsel to the committee and present on the two days that the testimony was given before the alleged sub-committee. The witness, though he could not remember the testimony, was asked to state it in summary form.

On defense counsel's strenuous objections to this procedure in the course of a colloquy at the bench, the prosecution, while not producing the transcript then and there in their possession, stated in response to a question by the judge that they "*anticipated that the transcript would be in evidence*" and finally that counsel for defense could use the transcript of testimony for "cross-examination if they have any doubt as to the accuracy of his (the witness Roger) memory." (R. 33 to 36.)

The transcript was then made available to defense counsel while the witness proceeded to "try to give the sub-

stance of the testimony." (R. 37.) The accuracy of the official transcript was never disputed. Two weeks later at the end of the government's case, the prosecution read portions of the transcript, the defense insisted upon reading the rest and the two volumes were introduced in evidence.

The witness stated short "summations" of what he claimed Lamarre had testified to, as to each count of the indictment. These "summaries" occupy about a half a printed page in the record for each count and make it appear that Lamarre's testimony on October 4 and October 6, 1947, was substantially as alleged in the indictment. The transcript shows that he did not so testify. As was inevitable, the witness attempted to fit his recollection to the indictment, an attempt which produced vital differences between his recollection and the verbatim transcript. As Judge Prettyman puts it (R. 572):

> "It is obvious that *what the witness gave was an essence of his own distillation and not an attempt to reproduce the whole of Lamarre's testimony. There are vital differences between Roger's recollection and the transcript which are vital in this case.* (R. 572.)
>
> "The sum of the practical aspect of the matter is that the prosecutor put to the jury at the opening of his case, out of the mouth of the complainant under oath and on the stand, the complainant's interpretation of the alleged perjured testimony, translating it into approximately what the indictment attributed to the alleged perjurer. I need not elaborate the tremendous advantage thus gained by the Government, an advantage later magnified by what occurred on attempted cross-examination." * (R. 573-574.)

The majority opinion brushes aside the undisputed transcript for scientific accuracy and completeness and fairness to the petitioner, and upholds the substitution of the

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* This reference by Judge Prettyman is to rulings by the trial judge on objections by the prosecution preventing defense counsel from cross-examining Rogers as to whether his "summarizations" were accurate in certain important respects. Prosecution had objected on the ground that the record speaks for itself. (R. 573.)

fallible and fragmentary memory of an interested party on the ground that the transcript was not a document covered by the best evidence rule. It cites cases in which, under quite different circumstances from those presented here, oral evidence has been received in place of or in addition to transcripts of testimony. Therefore, it holds, in substance, in the District of Columbia, the prosecution may introduce oral summations of basic testimony even if such summations are known to be false and tailored to fit the allegations of the indictment. If the defense later succeeds in forcing the government to produce and introduce the transcript of testimony which it has withheld from the defense, and that transcript is vitally different from the "summations" the whole tawdry and shabby procedure has the approval of the United States Court of Appeals for the District of Columbia, is "*not unfair at all,*" and "*It is quite clear*" to these judges that a defendant is "*in no way prejudiced.*" (R. 571.)

In addition to the deprivation of his right to a fair trial having been destroyed in the manner described by Judge Prettyman, the defendant Meyers was deprived of this right by other methods.

He was not tried evidentially on the charge of subornation of perjury. The government introduced more than a hundred exhibits in the form of checks on the Corporation's funds signed by Lamarre as President and Treasurer, bank statements and bank accounts of Lamarre and Mrs. Lamarre, cashier's checks drawn by Lamarre—all on funds of the Aviation Electric Corporation. Most of these checks were admittedly in payment of loans made by Meyer to the Corporation in 1939, 1940, and 1942, about which at neither the secret nor public hearings of the alleged subcommittee had there been the slightest dispute or conflict of testimony. They were introduced for the vicious and prejudicial purpose of adding to an atmosphere of sinister and secret gain on the part of appellant when it was known by the Government that the transcript of Lamarre's testi-

mony could not support the charges of the indictment for subornation of perjury upon which petitioner was being tried.

Efforts of counsel for petitioner to confine the trial to the issues presented by the indictment were of no avail. After it was apparent that proof of essential elements of this indictment was lacking, the trial judge permitted the prosecution to proceed on the theory that appellant was an evil character, referred to, without the slightest interruption from the bench, as **"that bird"** who had been **"living on the high profits from a corporation that he owns * * * while the boys were in the South Pacific sweating"**. (R. 363).

> "Well, you people, you ladies here who had sons overseas, everybody sacrificed, and you had to use ration books and had to conserve on oil, everybody sacrificed but Meyers was living on the fat of the land and was he sent overseas to fight and bleed and perhaps die? Meyers was here living on the fat of the land."

When counsel for the prosecution in final argument, over objection by appellant's counsel, stated that:

> **"if the perjury had not been suborned by the defendant and committed by Lamarre we wouldn't be here today."**

The court ruled **"I think that is within the realm of permissible argument"**. (R. 363.)

Again counsel for prosecution was permitted to state (R. 364) that:

> **"a verdict of not guilty would be the grossest miscarriage of justice and would do the greatest of harm and would be an invitation for perjury and subornation and * * * if you have perjury and subornation running amuck, you might as well close up your courts * * * might as well close up your Legislature. * * * You have got a chance to on this evidence here, and a verdict of guilty should be given on it, to cleanse the Augean stable."**

Requests for instructions to the jury were presented by defense counsel in further vain attempt to protect defendant's right to a fair trial (R. 346-357) and to confine the trial to the issues in the indictment. They were denied (R. p. 362), and were followed by a charge the more misleading parts of which are set forth in the Appendix to the Brief accompanying this petition (p. iii, *infra*).

The defendant's contention below, both on motion for judgment of acquittal and in requests for instructions was that the subcommittee, as the evidence showed it was constituted, was not a "competent tribunal" within the meaning of the perjury statutes and that therefore defendant was entitled to judgment of acquittal because Lamarre's testimony, no matter what it might have been, could no more have been perjury than if it had been given before any other informal group. Requests 51 and 52 (R. 353) asked an instruction to this effect and that to constitute a meeting of the full committee which would make it a "competent tribunal" to hear testimony within the meaning of the perjury statute at least a majority of the committee (in this case three members) must be in attendance.

These requests were peremptorily denied with the statement by the trial judge . . . "*unless some member present raises the objection there is no quorum, no one else may raise that objection and the proceedings are valid.*" (R. 360, 361.) Despite the opinion of this Court in the Sinclair case which was called to his attention, the judge persisted in such a ruling. (R. 361.) . . . "*it is not open to anyone but one of the members present to raise the objection of no quorum, and that objection must be raised at the time.*" (R. 361.) Thus the matter was left at the trial.

The majority opinion of the Court of Appeals notes that on the undisputed evidence on October 6 there were "only two senators were present" and proceeds, correctly, and contrary to the trial judge, to hold, as to October 6, "Since they were a minority of the subcommittee, they could not legally function except to adjourn. For that reason, the

testimony of Lamarre given on that day cannot be considered as perjury nor can appellant be convicted of suborning it." (R. 568.)

To the fact that evidence had been received by the trial judge without distinction between the two dates, both in Roger's "summations" and the official transcript of Lamarre's testimony of 315 pages on both October 4 and October 6 and that the defendant was prevented by the trial court from raising the question of competency of the tribunal for want of quorum, the majority opinion paid not the slightest attention other than to state:

> "But practically all Lamarre's testimony was given on October 4, when a quorum was present. The proceedings of that day contain the perjurious statements described in all three counts, and his examination On October 6 was largely repetitious." (R. 568.)

In this respect, therefore, the majority opinion hung the conviction upon the slender thread of the presence on October 4 of a quorum of three members of the alleged subcommittee. The evidence showed that regardless of any question as to the validity of the creation of the subcommittee by the Chairman of the full committee, there could not have been any quorum of validly appointed members of a subcommittee present on October 4th, for the reason that only one of the three Senators present was even a member of the Special Senate War Investigating Committee. The indictment alleges that the Senate of the United States, by Senate Resolution 71, 77th Congress, First Session, dated March 1, 1941, and Senate Resolution 46, 80th Congress, First Session, dated January 27, 1947, *created* and continued in existence its *Special Senate Committee . . . which on April 19, 1947, created a subcommittee*, presided over by Homer Ferguson, a member of the United States Senate, as Chairman, to investigate the National Defense program . . . that on the dates hereinafter mentioned, that matter was being investigated by the subcommittee . . . *that the subcommittee was a competent tribunal* before

which an oath might be administered to witnesses and Senator Ferguson was a competent and proper person to administer such oaths.

Senator Brewster, chairman of the full committee, was called (R. 73 to 93), and, with complete frankness, testified in direct contradiction to the essential allegations of the indictment relative to the formation of the subcommittee. The Special Senate Committee to Investigate the National Defense Program never created the subcommittee as alleged in the indictment. Senator Brewster, as chairman of the full committee in 1947, "*appointed a subcommittee* to deal with aircraft procurement practices," (R. 74) and made substitutions at will. (R. 75 to 77.) As to the appointment of the Chairman of the alleged subcommittee, Senator Brewster said, "I simply announced that he was to be Chairman of this subcommittee to deal with aircraft procurement." (R. 83.) *There was no resolution or vote of the full Committee authorizing the Chairman to appoint a subcommittee or a chairman thereof and concedely the subcommittee was never appointed by the full Committee.*

The Court of Appeals, majority opinion, holds that the contention that only the committee itself in the absence of specifically delegated authority may create subcommittees and appoint its members

> "lacks substance because the evidence shows it is the unvarying practice of the Senate to follow the method of creating and appointing subcommittees which was employed in this instance." (R. 568.)

There was no such evidence, beyond the testimony of Senator Brewster who stated that he had been a member of the Senate for eight years and that this was the method followed while he was in the Senate..

The majority opinion also holds:

> "After consideration of *all appellant's* points with respect to the subcommittee sitting on October 4, we conclude that it was legally constituted." (R. 568.)

The decision makes no distinction between practices which affect only members of Congress and those in which the rights of parties outside of Congress are concerned, nor does it refer to the fact that two of the three Senators held to constitute a quorum on October 4, 1947, were not even members of the Senate Special War Investigating Committee, for the reason that at the time of their attempted appointments there were no vacancies on this committee.

The special Senate War Investigating Committee was created by Senate Res. 71 as a seven man committee, Mar. 1, 1941, by the 77th Congress. (R. 333.) On Oct. 16, 1941, by S. Res. 175 (R. 335) the same Senate increased its membership by "three additional Senators, not more than two of whom shall be from the same political party." (R. 335.) Appointments were thereupon made bringing the committee up to its full membership of ten throughout the remaining existence of the 77th Congress.

The original committee of seven was revived from Congress to Congress, by specific reference to the creating resolution, #71, and all other resolutions relating thereto, except S. Res. 175 adding the three members during the 77th Congress. S. Res. #175 was never again referred to or revived.

The three Senators in attendance on Oct. 4, 1948, and held by the Court of Appeals to be a duly constituted quorum of a duly constituted subcommittee, were Senators McGrath, Ferguson and Cain.

In the Appendix to the Brief in support of this petition (p. i) we set forth a table of all the Senate Resolutions pertaining to the special Senate War Investigating Committee and also a chart of the appointments and purported appointments to the special Senate War Investigating Committee from its inception in 1941 through the year 1947. The membership chart of the Special Senate War Investigating Committee is compiled from Defendant's Exhibit No. 17 (R. 333-340) a certificate of Senate records authenticated by the Secretary of the Senate.

These show that the purported appointment of Senator Ferguson to the full committee was made on Jan. 28, 1943 (R. 336) and of Senator Cain on April 22, 1947. On both of these dates the special Senate War Investigating Committee had its full quota of seven members and there was no vacancy to which either could have been appointed to the seven man committee. There were no subsequent atempts at appointing either Senator Ferguson or Senator Cain.

Senator McGrath was appointed to the full committee on Jan. 31, 1947, at which time there was an existing vacancy. (R. 339.)

Both Senators McGrath and Cain, however, were temporarily appointed by Chairman Brewster to the subcommittee to substitute for Senators considered regular members who were absent. As Senator Brewster, with the complete frankness that characterized his testimony, put it:

> "you would appoint the members to substitute *during the absence, so that when the Senators returned, they would resume their functions when they got back to the city.* Neither Senator McGrath nor Senator Cain was appointed by the committee, nor was the appointments in either case announced to the committee." (R. 87.) (Italics ours.)

There was no evidence whatsoever that the Senators for whom Senators McGrath and Cain were still absent or that they were unable to resume their functions by October 4 or that they had not done so.

Yet the Court of Appeals disposes of the whole matter by deciding that "the subcommittee sitting on October 4 was "legally constituted." (R. 568.)

Before trial, defendant by motion sought the dismissal of the indictment upon the ground, among others, that perjury of the type set forth in the indictment must be prosecuted under the federal perjury code (Title 18, secs. 231, 232) rather than under the local District of Columbia code under

which these proceedings were brought. His motion was denied by the trial judge who said:

> "Surely it could not have been the intention of the Congress that perjury should not be punished as a crime . . . Any other construction would be unreasonable and unrealistic and would result in a frustration of the intention of Congress. Moreover, it would even do violence to the phraseology of the statute." (R. 9.)

When it came to sentence, however, the learned judge had this to say:

> "There ar two perjury statutes. The local District of Columbia Statute and the Federal Statute. The District of Columbia statute provides for a maximum of ten years for perjury or subornation of perjury, the Federal statute provides for a maximum of five years. The Court of Appeals was held that the District of Columbia statute prevails here. Nevertheless, in the exercise of the Court's discretion, since the offense was committed in connection with a Federal agency and if it had been committed before a Federal agency outside of the District of Columbia, the Federal statute would prevail, and the Court, in the exercise of its discretion, feels that it is reasonable not to exceed the maximum provided by the Federal statute. These remarks explain the reason of the Court for arriving at the sentence which it is now going to impose." (R. 391.)

Defendant's contention that perjury committed before a duly constituted congressional committee or subcommittee, whether in Washington, as elsewhere, must be prosecuted under the federal code, was disposed or by the majority opinion in one sentence:

> "To accept the argument would be to overrule our decisions in *O'Brien* v. *United States*, 69 App. D. C. 135, 99 F. (2nd) 368 (1938), and *Berhle* v. *United States*, 69 App. D. C. 304, 100 F. (2nd) 714 (1938), which we are not prepared to do." (R. 568-569.)

As to Judge Prettyman's finding that a judgment of acquittal should have been entered and that the decision

rests upon "*a departure from the basic principle that conviction can be had only upon proof of the acts alleged in the indictment,*" the record speaks for itself. The transcript of Lamarre's basic testimony on October 4 and 6, 1947, is ably concisely and unanswerably analyzed by him. (R. 577.) Reaching this inescapable conclusion, it was unnecessary for him to note that the record is a vacuum also as to corroboration of Lamarre except by Lamarre himself.

Jurisdiction.

The jurisdiction of this court is involved under Title 28, United States Judicial Code Title 28, § 1254 authorizing review by certiorari of judgment of the United States Court of Appeals for the District of Columbia, in criminal cases.

Reasons for Allowance of the Writ.

The writ should be granted and the judgment of the Court of Appeals for the District of Columbia should be reviewed and reversed for the following reasons: Under the question of the competency of the alleged sub-committee the Court of Appeals has decided confusedly and obscurely questions of increasing general importance relative to the matter of congressional committees, which in the public interest ought to be decided by this Court. Superficially regarded as technical ones the questions are substantial and important. The Court of Appeals obviously has not given the questions the study or attention they deserve.*

* *Christoffel* v. *United States* (Opinion No. 9788 decided by United States Court of Appeals for District of Columbia Circuit on November 22, 1948, two weeks after the Meyers decision) passed on this question. In Christoffel's case another trial judge had given what is held to be appropriate instructions to the jury on the question of quorum as it related to the matter of a "competent tribunal." In a footnote to the Christoffel case the writer of the opinion erroneously states that Judge Holtzoff made "a similar ruling in that (Meyers) case." As is shown here the ruling of Holtzoff, J., was in substance, entirely contrary. He gave lip service to the doctrine stated, in a bench conference at which our requests were discussed (R. 360), and declined to grant them on the ground that no one but a member of the committee could raise the question of a quorum. (See also charge to jury, R. 371.)

The Christoffel case also illustrates the discrimination practiced against Meyers by the Court of Appeals for the District of Columbia in the matter

They speak (R. 568) of the unvarying practice of the Senate, apparently as though such practice (if there were evidence of it) were binding on all persons outside the Senate in matters involving their rights and liberty, as though the courts had abdicated their function of deciding judicial questions when these point in the direction of the legislative branch of the government. They fail utterly to see or to differentiate between such questions as they relate to Congress itself and persons outside of Congress. They hold, in substance, that if a practice is continued by an unspecified number of Congressmen over an undetermined number of years it becomes binding and legal, no matter how illegal it may have been in the beginning, and this as to persons outside of Congress. They not only have failed to give proper effect to decisions of this Court in *United States* v. *Ballin,* 144 U. S. 5 (1891), and *United States* v. *Smith,* 286 U. S. 6. They have ignored these decisions altogether.

If an appellate court is permitted to brush aside in one sentence, as it does in this opinion, by the statement that *it has considered* "all of appellant's points with respect to the subcommittee" and conclude without more that *"it was legally constituted"*, no matter *how* constituted or created, whether its members were even members of the full committee itself, American citizens have no rights whatever with respect to such committees.

Congressional investigating committees have functioned since 1792. They are here to stay. They have accomplished much public good and the fact that questions concerning them have so seldom been before the courts is a tribute to the restraint and fairness and sense of propriety of generations of members of Congress from which the personnel

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of bail. We have made three applications for bail in that court, all raising this point among others, and all were denied on the ground that no substantial questions of law were presented. On March 12, 1948, the Court of Appeals granted bail to Christoffel on a record raising this and one other of our points. Christoffel's case was argued October 18, 1948, and decided November 22, 1948. Meyers' case was argued June 14, 1948, and decided November 8, 1948. Meanwhile Meyers remained in jail where he still is.

of such committees has been drawn. They must be, in a democratic system of government as we know it, under which one branch may check and balance another, subject to restrictions of fundamental law with respect to the rights of parties outside of Congress. It does their cause no service for a court, as the district court and the Court of Appeals majority did here, to abdicate the judicial function by fawning deference to the legislative branch. This Court has never done so, even when questions less important than human liberty were involved, as the decisions in the *Ballin* and *Smith* cases clearly show.

If, when a quorum of three is required to make a "competent tribunal", the three are from a subcommittee created by a committee chairman without vote or authority of the committee, its members appointed by him, two of them not even a member of the full committee itself, and two appointed without even notice or announcement to the committee, any group in Washington with the color of Congressional membership can be a "competent tribunal" within the meaning of the criminal statutes. This confused and outrageous situation obviously calls for the intervention of this Court. Furthermore, neither the Court of Appeals nor the district court judge gave proper effect to the opinion of this Court in *Sinclair* v. *United States*, 279 U. S. 263, 295-296, respecting the presumption of innocence and the matter of proof in such matters.

Further, in its single paragraph devoted to the important question of the indictment, the Court of Appeals has not given proper effect to the opinion of this Court in *Johnson* v. *United States*, 225 U. S. 405, which we believe clearly indicates that the law as laid down by this Court is that in a matter of general or national concern such as perjury before a Congressional committee in the District of Columbia, the District of Columbia Code is superseded by the Federal Criminal Code. The Court of Appeals has ignored the *Johnson* opinion and has stated only that it is not prepared to overrule its own opinions in the *O'Brien*

and *Behrle* cases, and therefore overrules our contentions. Two weeks later, however, the Court of Appeals in the *Christoffel* case holds that it has decided the point, *not* in the *O'Brien* and *Behrle* cases, but in the *Meyers* case. Thus is confusion added to confusion, and in this respect also, the Court of Appeals has decided an important federal question, either contrary to what this Court has already decided in the *Johnson* case, or contrary to the legislative intent in the passage of the District of Columbia Code and the Federal Criminal Code, and the question urgently requires a decision by this Court.

The writ should issue also because in its peremptory dismissal in a one sentence paragraph (R. 569) as *not "requiring discussion"* (R. 569) the majority opinion of the Court of Appeals has shown a flagrant disregard of the basic questions involving the rights of American citizens to due process of law and a fair and impartial trial. They have disregarded altogether the opinion of this Court in *Viereck* v. *United States*, 318 U.S. 236, relative to appeals to passion and prejudice in arguments by the prosecution. They have, in substance, decided contrary to all other Circuit Courts (including their own), as illustrated by the Sunderland opinion as to what constitutes a fair trial, as to what limits a federal judge can go as an "assisting prosecutor" in the conduct of the trial and in charging the jury and refusing to charge on the issues of the case. By their summary treatment of the whole subject of "fair trial", furthermore, they totally disregard and fail to give any effect to the spirit of the decisions of this Court cited in our brief on that most important and fundamental right. The opinion shows that had it not been for the vigorous and forthright dissent of Judge Prettyman on but two points in the case (which sixteen of the seventeen pages of majority opinion attempt to answer) this whole record would have been swept away in the same arbitrary and disdainful manner as not "requiring discussion" though it concerns the most fundamental rights to fair trial and judgment according to law of the land.

The writ should issue also because as part of the arbitrary unconcern by the majority of the Court of Appeals for questions concerning fundamental rights to a fair trial, there *is a departure "from the baisc principles that conviction can be had only on proof of the acts alleged in the indictment."*

The prosecution knew when the trial began that the transcript of Lamarre's testimony would not support the perjuries as set forth in the indictment. The trial judge before the trial was over also knew it. It was for this reason and for no other that the misleading and false summaries of 315 pages of transcript were put in as "proof" of Lamarre's testimony when the prosecution then and there had in its possession the irrefutable proof of what Lamarre did and did not say. It was for this reason further, that there were introduced in the trial evidence of checks and talk of money which had no bearing whatsoever upon the issues presented in the indictment but which under the argument of the prosecution and the charge of the trial judge to the jury made a conviction of this petitioner upon charges other than those that he was called upon by the indictment to defend. The majority decision of the Court of Appeals fails to give proper effect to the decision of this Court in *Brown* v. *Mississippi*, 297 U. S. 278 (*infra*, pp. 24, 25), in which it is held that such practices as were indulged in by the prosecution make the proceedings null and void.

Respectfully submitted,

Robert T. Bushnell,
17 East 63rd St.,
New York 21, N. Y.,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1948.

BENNETT E. MEYERS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The district court judge filed a written opinion on a motion by defendant below to dismiss the indictment. This opinion appears R. 7 to 11. Other rulings by the district court judge appear in the record with appropriate page references where relevant.

The opinion of the United States Circuit Court of Appeals for the District of Columbia is not yet reported officially but the text thereof is reproduced here. (R. 555B; Dissenting opinion of Judge Prettyman, R. 571-584.)

JURISDICTION.

The jurisdiction of this Court is involved under United States Judicial Code, Title 28, section 1254.

STATEMENT OF THE CASE.

The statement of the case has been made under the heading "Statement of the Matter Involved", *supra*, pages 3 to 14.

SPECIFICATION OF ERRORS.

The Court of Appeals erred:

1. In holding, in substance, that Bennett E. Meyers had been accorded a fair and impartial trial when in fact the proceedings below were "but a mask used as a means of depriving him of his liberty."

2. In holding as a matter of law that the alleged subcommittee hearing the testimony of Lamarre on October 4, 1947, was "a *competent tribunal*" within the meaning of a criminal statute.

3. In failing to find reversible error when admittedly on one of the two dates alleged in the indictment (October 6th) there was no "competent tribunal" present to hear the testimony) alleged to have been perjured, and when in fact such testimony given on October 6th had been admitted in evidence by the trial judge and submitted to the jury without distinction or instructions as to the competency of the tribunal on either date.

4. In holding, in substance, that the indictment in the instant case was properly brought under the District of Columbia Code.

5. In affirming the judgment of conviction in the absence of evidence to support the allegations of perjury set forth and defined in the three counts of the indictment and in the absence of any sufficient corroboration of the alleged perjured testimony.

SUMMARY OF ARGUMENT.

As to our contention that the petitioner herein was deprived of his constitutional rights to a fair and impartial trial:

(a) Judge Prettyman's findings in his dissent that the testimony given by Lamarre before the Senate Committee was presented to the jury upon the trial in so unfair and

prejudicial a fashion as to constitute reversible error and that such procedure "*lacked the minimum elements of fair play essential to our concept of fair trial*" is irrefutable and is supported by his compact analysis. (R. 577 to 584.) The record, however, goes further than that. The prosecution was permitted to try the case on the theory that if Lamarre had committed perjury in other respects or if Meyers had been a war profiteer or were otherwise morally reprehensible, he might be convicted on this indictment. In short, that he was an evil person, a pariah, who should be regarded as an object of contempt and therefore guilty of the charges in the indictment. This is conclusively shown by the nature of the argument that the prosecution was permitted, with the full approval of the trial judge, to address the jury. (R. 362 and R. 364.)

Our argument that the alleged subcommittees here could not be a "competent tribunal" for the purposes of this prosecution on October 4th, is based upon the undenied facts (a) that the subcommittee was never created by the full committee, that it was admittedly created by the chairman of the committee and that there is no provision in law vesting the power to create a subcommittee in the hands of a single individual who happens to be the chairman of the full committee. A subcommittee must be created and its members appointed by the committee—in the absence of delegated authority—which was not done here. (b) Even if the chairman had power to create a subcommittee and appoint its members, which he did not have here, he could not appoint as members of a subcommittee Senators who had never been validly appointed to the full committee. Here, Senators Ferguson and Cain, who sat as two members of the alleged subcommittee on October 4, 1947, had never been members of the full committee for the reasons that the full committee membership of seven was completely filled up at the time of their attempted appointments and no subsequent reappoints were at any time made. There being no vacancies, they could not be de facto members of the subcommittee. (c) Two of the three members

of the alleged subcommittee recorded in attendance on October 4, 1947, were appointed by the Chairman without even an announcement to the full committee (suggested by implication in the record as a means of legalizing appointments by the Chairman) to fill vacancies while other members appointed by the chairman were temporarily absent. There was no evidence whatsoever as to the continued absence or presence of the members whose places they were "appointed" to fill.

On any one of these grounds, it was impossible for a quorum of three members of a duly constituted subcommittee to have been present when Lamarre testified on October 4, 1947. On any theory advanced by the prosecution or the trial judge for the creation of, or appointment of members to, this alleged subcommittee, *no more than one duly appointed member was present on October 4th.* There was, therefore, no quorum present, the proceedings were void on the law requiring a quorum as correctly laid down by the majority opinion in this respect, and the committee had power only to adjourn. There was no "competent tribunal" present on October 4; no perjury could have been committed and failure to enter judgment of acquittal for the defendant on these grounds alone was a deprivation of his constitutional rights to a judgment according to the law of the land.

Our argument with respect to the inapplicability of the District of Columbia Code under which the indictment was brought is in substance that as to all offenses federal in nature of which the offense charged here is undeniably one, the applicable statute is the pertinent portion of the United States Criminal Code and the local statutes does not apply.

As to the findings by Judge Prettyman in his dissent (R. 584) that "*the trial court should have directed a verdict of acquittal*" and that the court's decision was a "*departure from the basic principle that conviction can be had only upon proof of the acts alleged in the indictment,*" we rest upon Judge Prettyman's accurate and compact analysis of the transcript of Lemarre's testimony on

October 4 and 6, 1947. (R. 584.) It should be noted further that the record is a vacuum as to any corroboration of the alleged perjury by Lamarre other than by Lamarre himself or of checks made out by himself to himself.

ARGUMENT.

I.

Petitioner Was Deprived of His Constitutional Rights to a Fair Trial.

The circumstances under which this petitioner was brought to trial on this indictment particularly called for a trial in the best American tradition, confined to the issues which the defendant was called upon by the indictment to defend. The case bears a striking resemblance to the "hue and cry" prosecutions held null and void by this Court as time and again it has stood as the last line of defense of human rights in this country.

In Dempsey v. *Moore,* 261 U. S. 86, 67, L. Ed. 543 (1923), petitioners claimed that the trial to which they had been subjected in the State of Arkansas was a mere form. The newspapers, the petitioner said, had daily published inflamatory articles up to and throughout the bringing of indictment and the trial. A "committee of seven" had been appointed to investigate the crime and had issued prejudicial statements (compare statement by Chairman of alleged subcommittee in Meyers case: "We haven't even lit the fire under him yet"—affidavit of Smith W. Brookhart, R. 14 at 18). Petitioners were indicted by the grand jury in an atmosphere of passion and prejudice within approximately a month after the events in question. (Meyers public hearings ended November 20, 1947, and this indictment was returned December 19, 1947). Petitioners were rushed to trial while public opinion was kept at white heat, and were speedily convicted. (In the Meyers case set down on arraignment for trial Feb. 14, 1948—the trial court granted one week's postponement on condition that no further con-

tinuance would be sought on any ground.) The Supreme Court of Arkansas upheld the conviction in an opinion giving more evidence of care and attention than the majority of the Court of Appeals affirming the conviction in the Meyers case. Mr. Justice Holmes in his opinion stated:

> "No circumstances * * * can prevent this Court from securing to petitioners their constitutional rights."

More recently, the late Chief Justice Hughes, in *Brown* v. *Mississippi*, 297 U. S. 278, at 286, 80 L. Ed. 682 (1936) referred to a "*solemn farce of hearing * * * gone through with.*" We charge that this characterization applies to the proceedings conducted here by the district court of the United States. In the same opinion, the late great Chief Justice said:

> "The State may not permit an accused to be hurried to conviction under mob domination where the whole proceeding is but a mask.
>
> ". . . **Nor may a State through the action of its offices contrive a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through deliberate deception of court and jury by the presentation of testimony known to be perjured.**"

The only purpose of the introduction of the alleged summaries by the witness Rogers was to deceive the jury into believing that Lamarre had testified to what Rogers in his summary said he did when in fact the government knew that the entire transcript showed that he not only did not so testify but testified to the contrary. The holding of the majority opinion that Meyers was not prejudiced by such procedure defies description. Every lawyer who has ever tried a case, looking at this record, knows that such a finding is not true.

Our complaint is of the nature described by Chief Justice Hughes in *Brown* v. *Mississippi*, supra, at pp. 286, 287:

> "*The complaint is not of the commission of mere error but of a wrong so fundamental that it made the*

whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void."

"*The Trial Court knew that there was no other evidence upon which conviction and sentence could be passed. Yet it proceeded to permit conviction and to pronounce sentence.* (Italics ours.)

"*The conviction and sentence were void for all of the essential elements of due process and the proceeding thus vitiated could be challenged in any appropriate manner.*"

The words of Mr. Justice Murphy in his dissenting opinion in *Carter* v. *Illinois*, 329 U. S. 67, S. C. T. Rep. 216, apply with force to the majority opinion here:

> "*Legal technicalities doubtless afford justification for our pretense of ignoring plain facts before us, facts upon which a man's very life or liberty conceivabilt could depend. But the result certainly does not enhance the high traditions of the judicial process.* (Italics ours.)

The argument to the jury.

Neither the district court judge who approved these arguments nor the two judges responsible for the opinion in the Court of Appeals paid the slightest attention to the doctrine of fair play laid down by this Court for their guidance but a few years before in *Viereck* v. *U. S.*, 318 U. S. 236 at 247 (1942). In the Viereck case this Court, referring to jury arguments wholly irrelevant to any facts or issues in the case, "*the purpose and effect of which could only have been to arouse passion and prejudice,*" said, at page 248:

> "At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury *were highly prejudicial and that they were offensive to the dignity and good order with which all proceedings in court should be conducted.*" (Italics ours.)

The Supreme Court went on to state for the guidance of United States trial courts in future cases its opinion that the trial judge should have stopped the prosecutor's discourse without waiting for an objection. In the *Meyers* case we not only objected but we asked for specific rulings to correct the prejudicial arguments. (R. 356-357, Requests Nos. 77 and 78 and R. 362-364.)

The remarks by the prosecutor in the *Viereck* case which called forth the statement of the above rule, appear in Note 3, at page 247, as follows:

> "In closing let me remind you, ladies and gentlemen, that this is war. This is war, harsh, cruel, murderous war. There are those who right at this very moment are plotting your death and my death.
>
> * * * The American people are relying upon you ladies and gentlemen.
>
> They are relying upon you, ladies and gentlemen, for their protection. We are at war. You have a duty to perform here. As a representative of your Government, I am calling upon every one of you to do your duty."

There are two distinctions between the situation in the *Viereck* case and the *Meyers* case. First, the prosecutor in the *Viereck* case was neither as personal nor as abusive, nor were his remarks as inflammatory as those of the prosecutor's in the *Meyers* case. Secondly, the war had ended, or more correctly, hostilities had ceased.

It is clear, however, that the Supreme Court, in dealing with this matter of fair trial in the *Viereck* case, was not intending to indulge in hair-splitting as to the existence or non-existence of a technical state of war. It was the passion and prejudice engendered by the prosecutor's summation to which the Supreme Court was addressing its remarks.

No case in the books has been found wherein such an argument has been permitted:

> *"If the perjury had not been suborned by the defendant and committed by Lamarre, we wouldn't be here today."*

—with a ruling by a court:

> *"I think that is within the realm of permissible argument."* (R. 363.)

To make triply sure that there would be no verdict on the issues presented by the indictment, the prosecution was permitted to argue, with the judge sitting approvingly by (R. 364):

> "a verdict of not guilty would be the grossest miscarriage of justice and would do the greatest of harm and would be an invitation for perjury and subornation * * * if you have perjury and subornation running amuck, you might as well close up your courts * * * might as well close up your Legislature. * * * You have got a chance to on this evidence here, and a verdict of guilty should be given on it, to cleanse the Augean stable."

Denial of defendant's requests and the court's charge to the jury.

Petitioner was entitled to something more than the repetition of trite (and sometimes by the way they were given, meaningless) repetition of general propositions of law. He was entitled to instructions that would direct the jury's attention to *issues presented by the indictment*, and to impartial instructions concerning the principles of law as applied to the facts of the case before them.

> *Bihn* v. *United States*, 66 S. Ct. 1172, 328 U. S. 633
> *United States* v. *Max, et al.*, 156 F. (2d) 13
> *United States* v. *Douglas*, 155 F. (2d) 895

He vainly attempted to secure these rights by the requests for instructions reproduced. (R. 346-357.)

The opinion in *Sunderland* v. *U. S.*, 19 F. (2d) 202, which might well have been written for the Meyers case, states that while a Federal judge may direct and control the proceedings "yet he may not extend his activities so far as to

become in effect either an assisting prosecutor or a thirteenth juror."

He may not argue or instruct, in substance, the jury to bring in a verdict of guilty.

United States v. *Gollin*, 166 F. (2d) 123.

The Court of Appeals for the District of Columbia has followed the law stated in all jurisdictions imposing restrictions upon the court's right to state opinions on the facts of the case *in cases other than United States* v. *Meyers*. The judge may not distort or add to the evidence or mislead the jury or comment in a hostile manner. His charge must be fair, dispassionate and judicial.

Wilson v. *United States*, 71 App. D. C. 54, 107 F. (2d) 253.
Colbert v. *United States*, 79 U. S. App. D. C. 261, 146 F. (2d) 10.

As to Meyers, however, the majority of two commits the Court of Appeals to the proposition (R. 569):

> "Appellant's assignment of error concerning the court's conduct, his criticism of the court's charge to the jury, and his complaint concerning government counsel's argument to the jury, do not impress us as requiring discussion."

The *Sunderland* and other leading cases point the way to what is held to be argumentative in charges of federal judges. The charge in the instant case was not only argumentative, it was downright misleading and in some instance used the phrase "there was evidence tending to show" when in fact there was no such evidence.

The charge is reproduced in full. (R. 364 to 380.) In the Appendix to this brief (pp. iii-vi), we point out a number of instances of misstatements, distortion and undue emphasis here condemned.

There are innocuous statements of the law and some of the issues. Commencing (R. 373), avoiding the pre-

cise phrases held argumentative in the *Sunderland* case, the judge resorts to the phrases "there was further testimony" . . . "it further appears from the transcript" . . . "it is further contended" . . . "you have the facts before you" (R. 375) . . . "Lamarre further testified" (R. 376-377), and other means of emphasis and argument set forth in the appendix.

In not a single instance did the judge point out any of the contentions of defendant as to law or fact from which inferences leading to reasonable doubt or a verdict of acquittal might be drawn. When this was pointed out to him at the bench following the charge (R. 380) he purported to justify it by expressing his ire because the defendant did not take the stand:

> ". . . The Court would have summarized in detail the defendant's testimony if the defendant had offered any testimony." (R. 380.)

The defendant had rested at the conclusion of the government's case after he had introduced Exhibit No. 17 (R. 333 to 340), the certificate from the Secretary of the United States Senate showing the legislative history of Special Senate War Investigating Committee and appointments thereto.

II.

The Alleged Subcommittee Before Which Lamarre Testified On October 4, 1947, Was Not a Competent Tribunal.

The Court of Appeals correctly ruled that in order to be a "*competent tribunal*" a quorum or majority of the alleged five-man subcommittee must have been in attendance. It therefore ruled out the October 6th meeting (one of the two upon which the indictment is base) and which the indictment does not distinguish from the other now remaining (October 4th).

"For that reason," says the Court (R. 568), "the testimony of Lamarre given on that day cannot be consid-

ered as perjury nor can appellant be convicted of suborning it." The opinion then proceeds to ignore altogether the ruling of the trial judge (R. 361) denying Meyers the benefit of this universally accepted rule of law or even of raising a question of fact relative thereto as was done in the case of *United States* v. *Christoffel* (Ct. Appeals #9788 decided Nov. 22, 1948).

It proceeds to strip Meyers of all rights in the matter and leave him in the same position he was in when the trial court made the ruling now admitted to be error. It says (R. 568) that "*practically all*" Lamarre's testimony was given on October 4th when a quorum was present and his examination on October 6th was "*largely repetitious.*" This and other instances noted in this brief show that Meyers was accorded no more of a fair hearing on his appeal than he was a fair trial in the district court. Obviously, it was impossible for any appellate court to determine how much the testimony relative to October 6th, utterly inadmissible for any purpose, could have affected the verdict.

There was no competent tribunal on October 4th for the reasons that:

(a) Two of the three Senators present were not even members of the full Special Investigating Committee and therefore could not be members of the subcommittee regardless of how they were appointed.

(b) Two of the three Senators present were appointed by the Chairman to fill temporary vacancies caused by the absence of two other members whom the Chairman had appointed previously. Their appointments were not even announced to the full committee and there was no evidence whether the vacancies were or were not still in existence on October 4th.

(c) The subcommittee was never created by the full committee as alleged in the indictment. It was *created* by the

Chairman of the full committee without authority or vote of the full committee. All three of the Senators present on October 4th were *appointed* by the *Chairman* without authority or vote of the full committee. Both the creation of the subcommittee and the appointment of its members were without legal effect insofar as they concerned the rights of persons outside of the Senate.

The records as to the history of the Special Senate War Investigating Committee and appointments and attempted appointments of its members are, of course, uncontradicted. There were no records of the alleged subcommittee or its creation or appointments thereto. The full committee was created as a seven man committee by S. Res. 71 in 1941. At the same session, later that year, by *S. Res. 175*, three additional places were created "not more than two of whom shall be from the same political party."

At the expiration of the 77th Congress on December 31st, 1942, the committee had a full membership of ten. Senate Resolution No. 6 of the 78th Congress recreated the committee of seven members specifically referring to S. Res. 71 and omitting S. Res. 175 which has added the three members. All subsequent resolutions through Resolution No. 46 of 1947 referred back to Resolution No. 71 and all others except Resolution No. 175 which, from the time of its passage by the 77th Congress, was never renewed or again referred to.

There is no evidence whatsoever that the 78th Congress, the 79th or the 80th ever intended to extend or revive the provisions of S. Res. 175 of the 77th Congress. It is clear, therefore, that from the opening of the 78th Congress in January, 1943, the committee was a seven man committee.

Senator Ferguson was purportedly appointed to the committee on *January 28, 1943. Senator Cain* was *appointed in 1947*. At the time of the appointment of both, there were already seven duly appointed and acting members of the committee. There were no vacancies to which either could be appointed. (Defendant's Exhibit 17, R. 333.)

There being no positions to be filled at the time of the attempted appointments, neither Senator became a de facto member of the committee. *United States* v. *Royer*, 69 L. Ed. 1011, 1013; 268 U. S. 394, 397.

Thus, two of the three Senators (Senators Ferguson and Cain) were not members of the committee at all, could never have been duly appointed members of the subcommittee and applying the law insofar as it is laid down in the majority decision here, there was no competent tribunal on October 4th.

It should be noted that the Special Senate Investigating Committee was not a standing committee. As its name implied, was a special committee.

A special committee created by one session of Congress ceases to exist upon the opening of the new Congress. If it is to be continued, it must be by act of the new Congress, and by specific intent.

This principle was recognized in *Sinclair* v. *United States*, 279 U. S. 263, 295-6, 49 S. Ct. 268. There, the new Congress passed a resolution describing in detail the function and powers of the committee created by Resolution 294, of the preceding Congress. By clerical error reference was made in the new resolution to a non-existent Senate Resolution *292* instead of 294. This Court found Congressional intent to refer to Resolution 294 and by the application of plain common sense held that there was in effect a continuance or revival of Resolution 294. The decision clearly indicates that in the absence of expressed intent to advert to Resolution 294 the Court would have held that the effect of the Resolution would have terminated.

In the present case, there was no such situation; there was no typographical error. There is no basis whatever for a finding that Congresses, subsequent to the 77th, intended to refer to Senate Resolution 175 of the 77th Congress, but made a mistake in expressing its intent. In fact, it is equally probable that beginning with 1943, the Senate felt that a seven man committee was sufficient, the country then being in the midst of war.

It has certainly never been contended that a subcommittee could be made up of non-members of the full committee for which it was purporting to act. Yet this is the effect of the majority opinion in this case when it says:

> "After consideration of all appellant's points with respect to the subcommittee sitting on October 4, we conclude that it was legally constituted." (R. 568.)

The opinion that the subcommittee was validly constituted because "it is the unvarying practice of the Senate to follow the method of creating and appointing subcommittees which was employed in this instance," and that therefore the three Senators present on October 4 could be a competent tribunal, was equally wrong.

First of all there was no such evidence. The judge tried to make it but failed in his attempted questioning of Senator Brewster. (R. 92 to 93.)

Secondly, even if there were proof of such invariable practice, it could not make legal what would otherwise be illegal insofar as rights of citizens outside of Congress were concerned. Such a finding indicates a ready willingness to abdicate a judicial function in favor of the legislative branch of the government. It fails to comprehend the difference between non-interference by the courts with legislative business as it affects members of Congress and rules of procedure adopted by it with respect to that business, and matters which affect persons other than members of the Congress. A decision in this case, for example, that the creation and action of the subcommittee was invalid as to petitioner, can be completely ignored by Congress, if it sees fit, in the matter of the appointment and creation of subcommittees, or anything else within the exclusive domain of Congress. When, however, the Executive Branch of the government, as here, seeks to base a criminal prosecution upon the existence of a "competent tribunal," quite a different matter is presented for the decision of the Judicial Branch.

The Court of Appeals has failed to give proper effect to the decision of this Court in *United States* v. *Smith*, 286 U. S. 6 (1932), wherein Mr. Justice Brandeis, speaking for the Court at page 32, said:

> "As the construction to be given to the rules affects persons other than members of the Senate, the questions presented is of necessity a judicial one."

In the instant case, the Court of Appeals refused to question, in a matter involving the liberty of a citizen, a nebulous, informal and unproven practice, on the ground, apparently, that such a practice could not be questioned, whereas, in the *Smith* case, this Court, without hesitation, dealt with a fixed rule of the Senate in a matter relative to the appointment to public office.

Likewise, in *United States* v. *Ballin*, 144 U. S. 5, this Court held without hesitation that Congress even by fixed rules *may not "ignore constitutional restraints or violate fundamental rights."*

The creation and appointment of subcommittees is clearly committee business, and in the absence of express delegation of authority by the full committee, no less than the action of a majority of the committee is required.

In the *Ballin* case, *supra*, this Court, quoting with approval Dillon's Municipal Corporations, holds it to be the law of the land that:

> ". . . Not only where the corporate power resides in a select body, as city council, but where it has been delegated to a committee or to agents, then in the absence of special provisions otherwise, a minority of the select body, or of the committee or agents, are powerless to bind the majority *or do any valid act.*"

Senate Resolution 71 (R. 334) recognizes this principle by providing that *"any duly authorized subcommittee thereof"* may act for it. There is no conceivable reason for insertion of this provision if it was thought that there was any general authority to appoint subcommittees.

See also *Fergus* v. *Russell*, 270 Ill. 304, at 356, where the Supreme Court of Illinois, taking a stricter view of the judicial function than the two judges of the Court of Appeals here, said:

> "We are not unmindful of the fact that for many years it has been the practice in this State and of each House thereof, to thus appoint, by joint or separate resolutions, committees to act after the session of the legislature has ended, but we have never been called upon to determine the validity of such action. The long indulgences in this custom cannot create a right in the legislature, or either House thereof, to do that which it has no power or authority to do."

The rule is laid down in all legislative manuals that the creation and appointments of members of committees, including the decision as to the number of members is made by the assembly. They state that in the absence of standing rule, delegating authority is a matter of legislative business. (*Cushing's Manual*, Chapter 15, Section II, para. 263 to 266.) Here, for example the President of the Senate would have no power to create the investigating committee or to fix the number of its members. That was done by Senate Resolution. Similarly, the Chairman of the committee could not create a subcommittee, fix the number of its members or appoint them, without express authorization of the full committee.

Even when the chairman has been authorized to select the members of the committee, he must announce their names to the assembly "and until such announcement is made, the committee cannot act." (*Robert's Rules of Order*, Section 32, p. 128.) No such announcement was made here sufficient to make the three Senators in attendance on October 4th a "duly appointed subcommittee" (R. 87).

The following authorities support the above premises:

Perry v. *Tyman*, 22 Barb. (NY) 137 (1856)
Commissioners of Excise v. *Sackrider*, 35 NY 153, 157.

Paducah and Illinois Ferry Co. v. *Robertson*, 161 Ky. 485, 171 S. D. 171 (1914).
Star Mills v. *Bailey*, 140 Ky. 194 (1910).
Ames v. *Goldfield Merger Mines Co.*, 227 F. 292 (D. C. Wash. 1915).
Chavelle v. *Washington Trust Co.*, 226 F. 400 (CCA 9, 1915).
C. A. Dodge Co. v. *Western, etc. Baptist Church*, 247 Mass. 330 (1942).
McGeorge v. *Big Stone Gap Improvement Co.*, 88 F. 599 (CC Va. 1898).
Bagnale v. *Ives*, 184 F. 466 (CC Pa. 1911).
Wescott v. *Wayne Agricultural Works*, 11 F. 298 (CC Ind. 1882).
Casler v. *Tanzer*, 134 NY Misc. 48 (Supreme Court, Herkimer Co., 1928).
Kavanaugh v. *Wausau*, 120 Wis. 611 (1904).
Rider v. *Portsmouth*, 67 N. H. 298 (1892).
State ex rel McLaughlin v. *Porter*, 113 Ind. 79 (1877).
State v. *King*, 20 NC 521 (1839).
Sioux City v. *Weare*, 59 Ia. 95 (1882).
Martin v. *Lemon*, 26 Conn. 192 (1857).
Blacket v. *Blizard*, 9 B & C 851, 190 Eng. Repr. 317.
Cook v. *Loveland*, 2 B & P 31, 126 Eng. Repr. 1138.

See also *U. S.* v. *Norris*, 300 U. S. 564, 57 S. Ct. 535, wherein the court pointed out that the original resolution establishing the full committee authorized it to act by a subcommittee and that *the full committee appointed the chairman as a subcommittee and specifically authorized him to name a subcommittee of one or more members.* The inference is clear that in the absence of such an authorization by the full committee the subcommittee would not have been a "competent tribunal." To the same effect *U. S.* v. *Seymour*, 50 F. 2d 930, wherein a resolution of the full committee had been passed authorizing the chairman to act as a subcommittee of one.

On any theory of proper legislative procedure, insofar as it affects persons other than members of the Senate, the majority decision of the Court of Appeals (R. 568), that the three Senators who met on October 4th were a "legally

constituted" subcommittee is wrong; there was no competent tribunal on either October 4 *or* October 6 and petitioner Meyers has been deprived of his right to due process of law by the judgment therein sustained.

III.

The Indictment Should Have Been Dismissed for the Reason That Perjury Alleged to Have Been Committed Before a Congressional Committee in Washington Is a Matter of National Concern and Must Be Prosecuted Under the Federal Criminal Code.

The majority opinion of the Court of Appeals (R. 568-569) does not decide the question raised one way or another in any forthright or understandable fashion. It notes our contention that the offense charged, being federal and not local in nature, must be prosecuted under the federal perjury statute 18 USCA secs. 231, 232, but says:

> "To accept the argument would be to overrule our decisions in *O'Brien* v. *United States,* 69 APP. D. C. 135, 99 F. (2nd) 368 (1938), and *Berhle* v. *United States,* 69 App. D. C. 304, 100 F. (2nd) 714 (1938), which we are not prepared to do." (R. pp. 568-569).

The opinion of the Supreme Court of the United States in *Johnson* v. *United States,* 225 U. S. 405, *infra* 39, it ignores altogether.

The *O'Brien* and *Berhle cases* both arose from the same set of facts— a local gang shooting on the streets of Washington. The perjury involved was admittedly a local matter having to do with testimony in the local courts relating to this shooting. Obviously, the offense was local in nature and the District of Columbia Code relating to perjury, as obviously applied.

In the *O'Brien case,* the appellant, while not contending that the District Code was not applicable substantively argued that he could not be more severely punished for such perjury than in any other United States Court, i. e., where

the milder federal code applied. The Court of Appeals held "... there is nothing to the point."

Whether right or wrong, the *O'Brien case* is no authority for the point raised here, and the majority shows grave miscomprehension as to the effect of that decision when it says that it would be necessary to overrule it in order to sustain the contention made here. In fact, the *O'Brien case* is the reverse of what happened here. Here, the trial judge (in the face of the *Johnson* decision) ruled that the local statute applied, but stated that in imposing sentence he would be guided by the federal statute. The *O'Brien case* held that where the local statute applied substantively, the federal statute had nothing to do with the sentence. The contention, rejected in the *O'Brien case,* was analogous to an argument that a perjury within the jurisdiction of the state of New York could not be punishable more severely than a perjury committed under the laws of another state where the punishment was less severe. The point insisted upon by us is that perjury before a Congressional committee is obviously a Federal offense covered by the Federal Code which has superseded the District Code for such offenses, that to hold otherwise would mean that one witness subpoenaed to appear before a sub-committee at a hearing in Washington would be subject to double the penalty another witness testifying before the same committee in the same investigation at a hearing in Baltimore.

The Court of Appeals in the *Christoffel case* says that the point was decided in the *Meyers case,* and then proceeds, in a one sentence footnote, to state that this sort of perjury, i. e., before Congressional committees "comes nearer than *most* others to being local, since Congressional committees *usually hold* their hearings in the District of Columbia." (Italics ours.) It is a matter of common knowledge that committees of Congress hold their hearings wherever they choose. Their right to do so is unquestioned, both for their own convenience and the convenience of wit-

nesses they desire to interrogate. *If they are hearings before regularly convened congressional committees, or duly authorized subcommittees thereof, perjury before them is the same offense whether committed in Washington, Baltimore or Seattle.*

The law as the Court of Appeals has now left it appears to be that if committed in Washington, the offense may be punishable by ten years imprisonment whereas if the same committee goes to Baltimore it is punishable by a maximum of five years—or even a fine! Obviously, the device used by the trial judge—a statement that he is guided by the maximum in the federal code (though he has held that the local code applies)—was nothing more nor less than a subterfuge, an attempt to destroy an exception by laying a basis for a claim that there was no harm done even if the local statute *did not* apply. The ruling *subjected* the defendant to the double penalty, and it was either wrong or right to indict him under the local statute.

In *Johnson* v. *United States,* 32 S. Ct. 748, 225 U. S. 405 at 413, the Supreme Court of the United States said:

> That some provisions of the Criminal Code are applicable to the District, is conceded. *It is conceded by the Government that the first ten chapters are applicable just as they are to the States, Territories and other districts, and that the same is true of chapter 12. The concession is put upon the ground that those chapters deal with offenses Federal in their nature.* Chapter 13, it is said, relates to territorial jurisdiction and deals with certain offenses 'when committed within any Territorial or district, or within or upon any places within the exclusive jurisdiction of the United States.' So far as the District Code deals with the offenses described in chapter 13, it is superseded by the Criminal Code." (Italics ours.)

Thus any perjury or subornation of perjury relating to the legislative business of the United States and coming within Sections 231 or 232 of Title 18 of the United States Code, part of chapter 6 of the original Code and of the

present Code, is governed by those provisions alone. These provisions supersede any provisions of the District of Columbia Code otherwise applicable, and the local statute has nothing further to do with them.

This Court notes in the *Johnson case* the concessions made by the government incuding that "it cannot be broadly stated that in the enactment of the Criminal Code there was no purpose to deal with or modify the District of Columbia Code in any respect." The Court, in discussing the co-existence of the two sets of criminal statutes—one applicable locally and the other generally, is dealing with sections of the United States Criminal Code which are *not* applicable in the District of Columbia.

The meaning is clear enough. It is that some sections of the District of Columbia Code *are* superseded while others are not. Sections 231 and 232 of Title 18 were a part of Chapter 6 of the original Code which in the *Johnson* case the government *conceded* applied to the District of Columbia, since it deals with an offense federal in nature, and in such case supersedes the District Code.

This Court, furthermore, in its discussion in the *Johnson* case of the co-existence of the two sets of criminal statutes, certainly did not hold that such co-existence gave federal prosecutors in Washington the *option*, depending upon whether they wish to impose the ten year penalty permitted under the District Court, or the lesser penalty under the Federal Code, proceeding under one or the other.

To state the proposition that Congress intended in passing either or both the Federal or local Code, that a witness testifying before a Congressional committee or subcommittee in Washington might be punished for ten years' imprisonment, whereas if the same committee chooses to summon another witness in the same investigation to testify on the same matter at a hearing across the line in Maryland or Pennsylvania, the latter may be punished by imprisonment for half this time or by a fine, is to refute it.

IV.

Petitioner Has Been Denied Due Process for the Reason That the Judgment of the District Court and the Majority Decision of the Court of Appeals Is "A Departure from the Basic Principle that Conviction Can Be Had Only Upon Proof of the Acts Alleged in the Indictment."

Judge Prettyman's careful analysis of the basic testimony of Lamarre (R. 577 to 584) is unanswerable. No amount of written argument can alter what appears in the cold black and white pages of the record as to what Lamarre testified before the alleged subcommittee on October 4th and October 6th, 1947. The majority opinion of the Court of Appeals attempts to answer it by a wholly erroneous statement of the defendant's position.

They state (R. 558):

> "Appellant's insistence that Lamarre did not say what the first count charged him with saying, but said exactly the opposite, is based on the fact that Lamarre was asked this question: 'So you understood all of the time that for all practical purposes, he (Meyers) owned the business'?, and that Lamarre answered by saying: 'That is right,' and then continued with other statements to that effect."

The contention made by defendant throughout the trial has been the exact opposite to what the two judges of the Court of Appeals state it to be. Petitioner's requests for instructions to the jury, Numbers 25 and 30 (R. 348), Nos. 42 and 43 (R. 350), and No. 44 (R. 351) all denied by the trial judge, amply demonstrate our position.

Judge Prettyman recognizes this distortion when he states (R. 579):

> *"As I understand it, the contention is based upon the whole of Lamarre's testimony, upon many questions and answers."* (Italics ours.)

CONCLUSION.

This is a case in which the form or outward appearance of a "trial" has been used to ruin and commit to jail one Bennett E. Meyers, a retired General of the Army of the United States. An honest perusal of this record, such as that given to the part considered by Judge Prettyman, cannot fail to disclose that the trial below was a subtle mockery, a travesty and a sham and that the two-judge decision of the Court of Appeals for the District of Columbia is a fitting and hypocritical climax to these disgraceful proceedings.

Meyers was indicted under a statute which would permit double the penalty for which the applicable statute made provision.

He was denied his right to a judgment of acquittal when the evidence of the prosecution disclosed that the perjuries upon which the indictment rested were never committed at all.

He was denied his right to a judgment of acquittal when the evidence disclosed that there was no "competent tribunal" before which the alleged perjuries could have been committed.

He was denied his rights to a fair trial conducted by an impartial judge confined to the issues presented by the indictment. His case was given to the jury following arguments appealing to passion and prejudice followed by a charge from that judge which violated rules repeatedly laid down as requisites for fair trials in American courts.

The United States Court of Appeals for the District of Columbia by a two to one decision marked by several distortions of the Record, has now given this iniquitous record the bath of appellate approval.

This petition for certiorari is submitted to the Supreme Court of the United States in the earnest belief that unless this Court here exercises its power for corrective action, some of the most grotesque and twisted rulings of law ever made in English-speaking courts will become cemented into

the structure of American law, to become vicious precedent in future time for the deprivation of rights of individuals marked for destruction, as yet unnumbered and unnamed. What has been done to Meyers, former General in the Army of the United States, can be done to anyone—unless this Court exercises its power to *compel* the courts below to administer "*Equal Justice Under Law.*"

Respectfully submitted,

ROBERT T. BUSHNELL,
17 East 63rd St.,
New York 21, N. Y.,
Attorney for Petitioner.

APPENDIX TO BRIEF.

A. Appointments to the Special Senate War Investigating Committee in Accordance With S. Res. 71, 77th Congress, and Renewing Resolutions and S. Res. 175, 77th Congress.

	77th Congress	78th Congress	79th Congress	80th Congress
	S. Res. 71 Mar. 1, 1941 R. pp. 112-113	S. Res. 6 Jan. 25, 1943 R. p. 107	S. Res. 55 Jan. 29, 1945 R. p. 109	S. Res. 46 Jan. 22, 1947 R. pp. 110-111
1.	Truman 3-8-41	Tunnell 8-11-44	—	† McCarthy 1-29-47
2.	Hayden 3-8-41 Hatch 4-15-41	—	Briggs 7-2-45	† Hatch 1-31-47
3.	Connally	—	—	Pepper 1-31-47
4.	Mead	—	—	* McGrath 1-31-47
5.	Wallgren	—	Mitchell 3-6-45	Williams 1-29-47
6.	Ball (Term Expired 11-17-42)	Appointed 1-28-43	—	† Malone 3-12-47
7.	Brewster	—	—	
	S. Res. 175 Oct. 16, 1941 (R. p. 335)	**(Note: S. Res. 175 increasing committee membership to ten not referred to in S. Res. 6, 78th Congress, S. Res. 55, 79th Congress or S. Res. 46, 80th Congress or in any other.)**		
8.	Kilgore 11-27-41	—	—	† O'Conner 1-31-47
9.	Herring 11-27-41	† Ferguson 1-28-43	—	—
10.	Bridges 11-27-41 Burton 3-16-42	—	Knowland 10-29-45	* Cain 4-22-47

† Members of alleged sub-committee for "Hughes-Meyers" Hearings appointed by Sen. Brewster. (R. 74.)

* Members "appointed" temporarily as substitutes for "members" temporarily absent. (Sen. Brewster, R. 75, 76, 77.)

The three Senators recorded as present on October 4, 1947 and held by Court of Appeals to be a "competent tribunal" (R. 568) were: Senators *Ferguson, Cain,* and *McGrath.*

B. Resolutions Pertaining to the Special Senate War Investigating Committee.

Resolution	Record Page No.
1941	
No. 71 (77th Congress First Session) Creating The Seven Man Committee	112 to 113
No. 146 (77th Congress, First Session) Raising the limit of expenditures of the Committee	105
No. 175 (77th Congress, First Session) Increasing by three additional Senators "not more than two of whom shall be from the same political party" the Committee created by Resolution 71	393
No. 288 (77th Congress, Second Session) Increasing expenditures of the Committee	106
1943	
No. 6 (78th Congress, First Session) Expressly continuing the authority conferred by Res. 71 during the sessions, recesses and adjournment periods of the 78th Congress	107
No. 146 (78th Congress, First Session) Increasing the expenditures of the Committee	107
No. 235 (78th Congress, Second Session) Again increasing expenditure limit for the Committee	108
No. 319 (78th Congress, Second Session) Again increasing the expenditure limit and containing a provision relative to employees	108 and 109
1945	
No. 55 (*79th Congress, First Session*) Continuing the authority conferred by S. Res. 71, 77th, Congress (and naming all subsequent resolutions except 175) during the sessions, recesses and adjournment periods of the 79th Congress	109

1947

No. 46 (80th Congress, First Session) Continuing the authority conferred by S. Res. 71 and naming all subsequent resolutions except 79, with certain limitations therein stated 110 and 111

C. Misleading Statements by the Trial Judge to the Jury on Important Aspects of the Case.

1. Referring to the Senate Committee, the Court told the jury (R. 371):

> "In April, 1947, this Committee, as it had a right to do, created a subcommittee of which subcommittee Senator Ferguson was Chairman."

The evidence. There was no such evidence. The evidence was directly to the contrary. The committee never appointed the subcommittee at all.

2. The Court told the jury (R. 372):

> "The transcript of the testimony given by Lamarre before the subcommittee *appears* (italics ours) to contain in one place a statement in response to a question that the defendant Meyers owned the Aviation Electric Corporation, but later it appeared in the transcript as the court recalls * * * later in his testimony Lamarre made statements to the effect that there was no connection between the defendant Meyers and the Aviation Electric Company and that the defendant had merely made certain loans to the Corporation which loans had been repaid * * *." (R. 372.)
>
> "* * * and after saying that the defendant Meyers owned the Company Lamarre later said that there was no connection between Meyers and the Company and that Meyers had only really made certain loans to the Company which loans had been repaid."

The evidence. This is a distortion of the contents of the transcript of Lamarre's evidence. The court reluctantly

informs the jury that this transcript "*appears*" to contain one reference by Lamarre to Meyers' ownership of the Corporation. Actually there were two such statements appearing in the transcript (R. 142 and 143) and nowhere is there justification for the statement, *twice* repeated by the judge, that Lamarre ever said that there was no connection between Meyers and the Company.

The prosecution from start to finish of the trial never pointed out, in spite of insistent demands by appellant's counsel, any portion of the transcript which could be so construed.

Nowhere does the court suggest as any fair judge would have done that the transcript is in evidence and that the jury should examine it if it felt so inclined and that the judge's "summaries" were no more accurate than those of the witness Rogers, whose testimony, in effect, this charge buttresses and fortifies.

3. The court told the jury:

> "The government offered testimony by Lamarre tending to show that as a matter of fact all of the stock in the Aviation Electric Corporation was actually and beneficially owned by the defendant Meyers. * * *
>
> "The government also offered testimony by Lamarre and by Readnower and other witnesses tending to show the profits made by Aviation Electric Corporation were paid over to the defendant Meyers by various means and various arrangements. * * *
>
> "There was further testimony of the expenses of the defendant Meyers, such as the cost of redecorating his apartment, the purchase of a radio for him, the purchase of air-conditioning equipment for his apartment, were all paid for out of the funds of Aviation Electric Corporation pursuant to his direction. *If you believe this and other testimony on this issue, you have a right to reach the conclusion that, as a matter of fact, the defendant Meyers was financially interested in the Aviation Electric Corporation, and that any testimony given by Lamarre to the contrary before the subcommittee was false.*" (R. 374.) (Italics ours.)

The evidence. There was no such testimony. The testimony was to the contrary.

The court had preceded that portion of the charge immediately above quoted by the following astounding definition of the term "financially interested":

> "* * * *A financial interest in a corporation means—or let me put it this way—to have a financial interest in a corporation means to be an actual beneficial owner of the stock of a corporation or have some other connection with the corporation whereby a part of the profits or capital of the company belongs to or is paid to the person who has the financial interest.*" (R. 373.) (Italics ours.)

4. The judge, in what he termed "a brief summary of the testimony as adduced by the government on this point", told the jury:

> "It is further contended that Lamarre had testified before the Senate Subcommittee that the cost of redecorating defendant's apartment at 2400 16th Street at an approximate cost of $10,000 had been a gift from him, Lamarre, to the defendant. The testimony of Lamarre on the witness stand in this case, as you will recall, was to the effect that the cost of redecorating the apartment was in fact paid out of funds of Aviation Electric Corporation, and in corroboration of Lamarre's testimony and on this point the government offered in evidence cancelled checks of the Aviation Electric Corporation paid to the decorator, Neta Davis, and also offered the oral testimony of Neta Davis." (R. 375.)

The evidence. Whatever the circumstances of the eventual adoption of the legal term "gift" as applied to the redecorating transaction, the transcript of his testimony before the alleged subcommittee makes clear the fact that Lamarre there testified that the cost of redecorating the apartment was in fact paid out of funds of Aviation Electric Corporation. There could be no doubt or misapprehension on this point.

The above do not purport to be a statement of all the errors in this vicious charge. They serve to illustrate how the desired result of Meyers conviction was obtained "by departure from the basic principle that conviction can only be had upon proof of the acts alleged in the indictment". As above noted, R. 374, the jury was left to find "any testimony given by Lamarre to the contrary before the subcommittee was false" and therefore would sustain a finding of guilty.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 467.

BENNETT MEYERS, *Petitioner,*

—against—

UNITED STATES OF AMERICA, *Respondent.*

PETITIONER'S REPLY BRIEF.

ROBERT T. BUSHNELL,
WILLIAM J. BUTLER,
17 East 63rd St.,
New York 21, N. Y.,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITIONER'S REPLY BRIEF.

We wish to direct the Court's attention to some of the more flagrant errors in the Government's brief in opposition to our petition for certiorari.

1. As to the Inapplicability of the District of Columbia Perjury Statute.

After reluctantly conceding that petitioner is right in his contention that the crime for which he was indicted is not within the local perjury statute, the Government purports to argue (Brief, p. 11, fn. 4) that the point was not before the trial judge. This specious suggestion is immediately disposed of by reference to the record. On petitioner's preliminary motion to dismiss the indictment the trial court

flatly holds that the local statute applies (R. 9). Likewise the point was specifically before the court on the question of a judgment of acquittal and when sentence was imposed (R. 391). The Court of Appeals recognized that the issue had been raised (R. 568). See also opinion of Court of Appeals in *Christoffel* v. *United States*, No. 9788, decided Nov. 22, 1948, wherein it cites its opinion in the Meyers case as authority for the proposition that the local statute is applicable in such a case.

It was obviously unnecessary to print a record of greater length on the raising of an issue which had never been denied below. For the Government now to suggest that the point was not raised is an attempt to make an unconscionable use of the rules which encourage the printing of parts only of the record so as to eliminate non-controversial matter.

The treatment of this point since the beginning of the case is characteristic also of the vicissitudes of petitioner's efforts to secure a correct adjudication of the legal principles applicable to his case. Here, the trial judge brushed aside the point that the petitioner had been indicted under the wrong statute, taking care, however, to impose a sentence no more severe than the maximum provided under the right statute. The Court of Appeals was not willing to say that petitioner was wrong in contending that the local statute is inapplicable, but felt constrained to say (erroneously) that it was required by its own decisions to persist in the opposite view. We now come to the Supreme Court and find the Government forced to concede that petitioner has been right throughout, but attempting to turn the point aside by the false suggestion that the point was not raised below.

There is also a reference in this connection (Government's brief, p. 11, fn. 3) to Rule 7-c of the Federal Rules of Criminal Procedure relating to errors in the citation in the indictment of the statute which the defendant is alleged

to have violated. The rule has no bearing whatever upon the problem here involved. There was no error in the indictment in the citation of the statute under which petitioner was indicted. The indictment correctly cited the statute under which the Government intended to and did indict petitioner. The whole point here is that the facts alleged in the indictment, being a matter of national concern, do not constitute an offense under that statute.

2. As to the Subcommittee.

The Government argues (Brief, pp. 11-12) that the Court of Appeals was wrong in agreeing with petitioner that, because only two of the five members were present, there was less than a quorum of the subcommittee present on October 6, 1947. The suggestion is that two members might have been a quorum since under the standing rules of the Senate, standing committees may fix for themselves the number to constitute a quorum provided it is not less than one-third of the entire membership.

This is a completely mistaken reference. The committee here involved, the Senate War Investigating Committee, was not a standing committee. It was a special or select committee, as the indictment specifically alleges (R. 2). The Government calls attention to no special rule regulating quorums of special committees or subcommittees thereof and it is well recognized that in the absence of a special rule, a majority of the body is necessary to constitute a quorum. (4 *Hinds' Precedents,* §§ 4540, 4552, 4686; Jefferson's *Manual,* § XXVI; Elsynge's *Method of Passing Bills,* p. 11.)

The fact that there is no basis for supposing that two members of the subcommittee might under any circumstances have been sufficient to constitute a quorum at the purported session of October 6, 1947, is sufficient to dispose of the Government's remarkable suggestion (Brief, p. 12)—apparently another innovation especially designed to apply to this petitioner—that the burden of proof was

upon the defendant with respect to this issue in *this* criminal trial.

With respect to the question whether the Senate War Investigating Committee continued to be a ten-man committee after the commencement of the 78th Congress, the Government urges that the committee, as originally created in the 77th Congress, was authorized to sit during succeeding Congresses. The Government claims (Brief, p. 13, fn. 7) that it can find nothing in the *Sinclair* case to indicate that Congress has no power to create such a continuing committee. Reference to the *Sinclair* case will disclose that the Court specifically adverted to the point, saying (p. 295):

> "Resolution 282 and 294 were sufficient until the expiration of the 67th Congress during which they were adopted, * * *"

The Court then went on to point out that Resolution 434 of the next Congress was sufficient to continue the power of the committee. The Court not only stated but clearly supposed throughout that a congressional committee may not be authorized to act beyond the commencement of the next succeeding Congress. Indeed, the precedents are clear to that effect. (4 *Hinds' Precedents*, §§ 4394, 4420, 4541, 4545). There is a difference between the Senate and the House in that the Senate, as a continuing body, may authorize one of its committees to act after the expiration of the Congress during which it was created, but only during the recess. At the commencement of the next Congress, a new authorization is necessary (*McGrain* v. *Daugherty*, 273 U. S. 135, 180-2; 4 *Hinds' Precedents*, § 4544).

With respect to the creation of the subcommittee, the Government argues (Brief, p. 14) that there was evidence that the full committee had authorized the chairman to appoint subcommittees. The portions of the record there referred to show conclusively that there was no such evidence. The witness Rogers, who first became connected with the committee in April, 1947, attempted to state in

general terms that there had been some oral authorization to that effect in 1941 but when this type of testimony was objected to and the witness was pressed to show what the actual fact was, he was wholly unable to do so. As he admitted (R. 46):

> "I probably shouldn't have said that. I understand that is a fact, but I wasn't there at the time."

Moreover, Senator Brewster, the chairman of the committee, claimed no such authorization. On the contrary, he made it perfectly clear that in appointing the subcommittee, he had not purported to act on the basis of any authorization by the full committee (R. 82).

Of course, even proof that the full committee had authorized the chairman to create subcommittees would not help the Government in view of the well established principle that the delegation of authority which is effected by the appointment of a subcommittee can be made only by the body which possessed the authority, namely, the full committee. (See authorities collected in our main petition, pp. 34-6).

The record references given by the Government (Brief, p. 14) in support of the statement that it was an invariable Senate custom for committee chairmen to appoint subcommittees without any committee action show no more than that Senator Brewster indulged in the practice and considered it usual. The only indication of the actions of other committees and chairmen is Senator Brewster's testimony (R. 93) that he had been appointed to subcommittees by the chairmen of Senate committees without, so far as he knew, any committee action. But all that Senator Brewster could know in any case was that the chairman had named him as a member of a subcommittee. It is, indeed, customary practice for chairmen to name the members of subcommittees after the subcommittee has been created. Cushing's *Manual of Parliamentary Practice* [Bolles' Ed. 1928], Ch. XV, § II, pars. 263-6; Robert's,

Rules of Order [1943] § 32, p. 128). The creation of the subcommittee, however, is committee business which can be done only by the whole committee at a formal meeting. (4 *Hinds' Precedents*, §§ 4540, 4583-6; 8 Cannon's *Precedents*, § 2209-11; Cushing's *Manual*, Ch. XV, § V, par. 306; Robert's *Rules of Order* [1943] § 52, pp. 212, 217-8; Fish, *American Manual of Parliamentary Law* [1879] § 194[f]; Burleigh, *Legislative Guide* (1861) p. 236). The opposition brief concludes its discussion of this point with the astonishing suggestion that the question whether the subcommittee was validly created may not touch petitioner's fundamental rights. It is hardly necessary to state that the fundamental right here violated was the right not to be indicted and convicted of suborning alleged perjury committed before a purported subcommittee which was in fact a nullity, when the perjury statute makes the competency of the tribunal an essential element of the crime.

3. Sufficiency of the Evidence.

In attempting to defend the trial court's action in permitting the witness Rogers to testify to a summation of Lamarre's testimony before the alleged subcommittee, the Government asserts (Brief, p. 21):

> "A reading of Rogers summations demonstrates that they were an accurate statement of the substance of Lamarre's testimony."

This simply is not so. As Judge Prettyman in his careful analysis of this testimony and outrageous procedure puts it:

> "It is obvious that what the witness gave as 'substance' was an essence of his own distillation and not an attempt to reproduce the whole of Lamarre's testimony. *There are differences between Rogers recollection and the transcript which are vital in the case.* (Italics ours) (R. 572)

No amount of assertion by either side can alter these facts. Judge Prettyman had read the record.

The Government's brief also contains numerous subtle attempts to deprive petitioner of the benefit of the presumption of innocence. For example, it is said on p. 15, "Petitioner does not deny that Lamarre, at his behest, lied to the committee." *Of course,* petitioner denies that Lamarre, at his behest, lied to the subcommittee. Petitioner pleaded "not guilty" to this indictment, thereby placing in issue as between the Government and himself, every essential allegation in it. The above quoted sentence is an illustration of the subtle attempts encountered by this petitioner in the courts below to deprive him of the presumption of innocence and to make it appear that the exercise of his right not to take the witness stand in the absence of proof of essential elements of the charge against him amounted to tacit admission of guilt in some particulars. As a part of the same fabric appear similar statements in the opposition brief (pp. 7, 8, and 9) to the effect that "At the trial Lamarre *admitted* that his testimony before the subcommittee was false".

What testimony was false? The transcript of Lamarre's testimony showed that he had not testified as alleged in the indictment, the charge that this petitioner was called upon to meet. Placed upon the witness stand, as the Government's principal witness after Rogers, and before the transcript of his testimony had been introduced, Lamarre was permitted to state that he had testified falsely in numerous unidentified respects. The trial judge left it to the jury that if Lamarre had testified falsely "in other respects" the jury could, and in fact should, find the petitioner guilty of having suborned the unspecified perjury. These statements in the brief, showing the pattern of treatment accorded petitioner in the courts below, illustrate in the clearest possible manner how petitioner was deprived of his fundamental right to a fair and impartial trial and why the writ herein sought should be granted.

4. As to the Matter of Prejudicial Error in the Conduct of the Trial.

The opposition brief (p. 21) adopts the convenient method followed by the majority opinion of the Court of Appeals—of virtually ignoring the point—and the opinion of this Court in the *Viereck* case.

The fact remains that the Court of Appeals decision failed to give proper application to a decision of this Court relative to the fundamental right to a fair trial (*Viereck* v. *United States*, 318 U. S. 230). This fact alone, if there were no other, is sufficient reason for granting this writ.

Respectfully submitted,

ROBERT T. BUSHNELL,
WILLIAM J. BUTLER,
17 East 63rd St.,
New York 21, N. Y.,
Attorneys for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 467

BENNETT E. MEYERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 7-11) denying the motion to dismiss the indictment is reported at 75 F. Supp. 486. The majority (R. 555B-571) and dissenting (R. 571-584) opinions in the Court of Appeals are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered November 8, 1948 (R. 585). On December 6,

1948, by order of the Chief Justice, the time for filing a petition for a writ of certiorari was extended to December 18, 1948 (R. 589). The petition was filed December 16, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner, who was accused of suborning the commission of perjury by one Lamarre before a Congressional subcommittee holding hearings in Washington, D. C., should have been indicted under the federal statute (18 U. S. C. (1946 ed.) 232, now 18 U. S. C. 1622) rather than under the local District of Columbia statute (22 D. C. Code (1940), 2501).

2. Whether the subcommittee was validly constituted.

3. Whether the evidence established that Lamarre made the statements to the subcommittee as alleged in the indictment, and was sufficient to prove the falsity of those statements.

4. Whether the trial court erred in permitting counsel for the subcommittee to testify to the substance of Lamarre's statements before the subcommittee, although a full transcript of the subcommittee proceedings was available.

5. Whether prejudicial error was committed in the prosecutor's opening statement or closing argument to the jury, or in the court's instructions.

STATUTES INVOLVED

The federal perjury statutes, 18 U. S. C. (1946 ed.) 231 and 232, Crim. Code, §§ 125, 126 (now 18 U. S. C. 1621 and 1622), provided as of the dates involved here:

> Sec. 231. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.
>
> Sec. 232. Whoever shall procure another to commit any perjury is guilty of subornation of perjury, and punishable as in section 231 of this title prescribed.

The District of Columbia perjury statute, 22 D. C. Code (1940), 2501, provides:

> Every person who, having taken an oath or affirmation before a competent tribunal, officer, or person, in any case in which the law authorized such oath or affirmation to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath or affirmation states or sub-

scribes any material matter which he does not believe to be true, shall be guilty of perjury; and any person convicted of perjury or subornation of perjury shall be punished by imprisonment in the penitentiary for not less than two nor more than ten years. Any such false testimony, declaration, deposition, or certificate given in the District of Columbia, but intended to be used in a judicial proceeding elsewhere, shall also be perjury within the meaning of this section.

STATEMENT

On December 19, 1947, a six-count indictment was filed in the District Court for the District of Columbia charging Bleriot H. Lamarre and petitioner with perjury and subornation thereof, respectively. The indictment alleged the creation in 1941 of a Special Senate Committee to Investigate the National Defense Program; the creation on April 19, 1947, of a subcommittee headed by Senator Ferguson to investigate the procurement of aircraft and aircraft material; and the jurisdiction of the subcommittee to examine witnesses under oath administered by Senator Ferguson. The first count alleged that on October 4 and 6, 1947, Lamarre testified falsely under oath before the subcommittee that petitioner was not financially interested in or connected with the Aviation Electric Corporation of Dayton, Ohio, during any of the years from 1940 to 1947, inclusive. The third count alleged that on the same dates Lamarre testified falsely be-

fore the subcommittee that a Cadillac automobile had been purchased for the Aviation Electric Corporation and for the use of the Aviation Electric Corporation. The fifth count alleged that Lamarre further testified falsely that the cost of redecorating petitioner's apartment in Washington, amounting to about $10,000, was a gift to petitioner from Lamarre. The second, fourth and sixth counts charged that petitioner suborned Lamarre to testify falsely as alleged in the first, third and fifth counts. (R. 2-7.) Lamarre pleaded guilty (R. 368). Petitioner moved that the indictment be dismissed on the ground that perjury before a Senate committee is not a crime under the local District of Columbia statute. The motion was denied. (R. 7-11.) After a jury trial, petitioner was convicted on all three counts pertaining to him and was sentenced generally to imprisonment for a period of twenty months to five years (R. 391-392).

The evidence for the Government relative to Lamarre's perjury and petitioner's subornation thereof may be summarized as follows:

1. *Petitioner's financial interest in the corporation.*—On October 4, 1947, Lamarre was sworn (R. 115-116) and testified before the subcommittee that petitioner organized the Aviation Electric Corporation of Dayton, Ohio, in September 1939, contributing all the initial capital of $500 (R. 144); that in January 1940 petitioner persuaded him to take over the management of the company which

was manufacturing aircraft parts (R. 125-133); that when he came into the company the stock was transferred to his name (R. 134, 138-139); that although he paid no consideration for the stock, he considered that it belonged to him from the time of the transfer (R. 144-148), but that he indorsed it in blank and turned it over to petitioner to secure large loans which petitioner made to the corporation to enable it to go into operation (R. 139-141); that he was the "boss" of the corporation (R. 143, 148) and that the corporation's debt to petitioner was paid off completely in 1941 (R. 141), as the result of petitioner's desire to terminate all connection with it (R. 267); that a further loan by petitioner to the corporation in March 1942 was paid off in October of that same year (R. 141, 230, 261, 267-268, 283). All other efforts of the subcommittee to get Lamarre to admit that petitioner had any other financial connection with the corporation prior to October 1942, or any such connection with it thereafter, were fruitless, and Lamarre gave various explanations of numerous corporate expenses about which he was asked (R. 116-288). On October 6, 1947, Lamarre again testified before the subcommittee as to petitioner's financial dealings with the company (R. 290-301, 317-326), but added nothing substantial to his previous testimony that petitioner owned no stock in the company after January 1940 and was not a creditor after October 1942.

At the trial Lamarre admitted that his testimony before the subcommittee was false (R. 507). He testified that petitioner put him into the company to protect petitioner's financial interests in it (R. 398-404); that petitioner was the owner of the company from the beginning to the time of dissolution (R. 404, 426, 437, 446, 464); that during his connection with the company over $150,000 was paid to petitioner out of its funds, exclusive of the amounts repaid to petitioner on loans (R. 492); that the payments were made under various guises in order to conceal petitioner's interest in the company (see, e. g., R. 414-415, 441-444, 447-450); that during petitioner's long absences from Dayton on army service, Lamarre sent him almost daily reports (R. 407-408). Lamarre further testified that the day before he appeared before the subcommittee, petitioner instructed him to tell it that petitioner had no interest in the company aside from the loans which were repaid before the end of 1942 (R. 502).

2. *The Cadillac automobile.*—At his first appearance before the subcommittee on October 4, 1947, Lamarre testified that the company owned a Cadillac, which had originally cost $3,000 and which he used on company business, and that in 1944 the car was sold to Curnutt, petitioner's father-in-law and an official of the corporation (R. 237-238). On October 6, 1947, he told the subcommittee that this "company car" (R. 323) was the only car which the company had; that he and Cur-

nutt were the only company officers authorized to use it; that it had remained in petitioner's garage in Washington for several weeks when bad weather prevented Lamarre from driving it back to Dayton; that title was in the company's name and payment for it was made with company funds; that petitioner made arrangements for the purchase of the car in Washington late in 1941 at Lamarre's request, because of the difficulty of getting cars; and that petitioner also took delivery and made arrangements for the insurance (R. 326-331).

At the trial Lamarre admitted that this story was false (R. 512). He testified that petitioner directed him to send company funds for the purchase of the car; that the company had no use for the car and never had possession of it; that it remained in petitioner's possession; and that title was eventually transferred from the company to Curnutt at petitioner's direction (R. 429-435). Lamarre further testified that the story he told the subcommittee was in accordance with instructions previously given him by petitioner (R. 501).

3. *The decoration of petitioner's apartment.*— On the morning of October 4, 1947, Lamarre was asked by the subcommittee what gifts he had given petitioner; he replied that his gifts to petitioner had never involved any substantial amount (R. 190-191). In the afternoon Lamarre volunteered that he desired to amplify his testimony on this subject. He then said that he had personally paid $10,000

for the redecoration of petitioner's apartment in Washington. He said at first that he did not regard this as a gift but rather as a moral obligation because petitioner had been so kind to him. (R. 194, 195, 197, 208, 232-233.) Under repeated questioning, however, he stated that he had offered to pay for the redecoration without any request by petitioner; that payment was made out of his own salary; that all his legal debts to petitioner had been paid at the time; and that it was actually a gift (R. 194-199, 232-234, 237, 268-269). On October 6, 1947, the subcommittee tried to get Lamarre to admit that the redecoration had been paid for with company funds at petitioner's direction (R. 302-317). But the witness insisted that he had paid the amount personally; that it was not in repayment of any loan from petitioner or part of any business deal; that it had no consideration; and that "in a legal sense, it undoubtedly would be a gift" (R. 309-310).

At the trial Lamarre admitted that this story was false (R. 507). He testified that payment for the redecoration was made from company funds at petitioner's direction (R. 424-426). He testified further that the story he told the subcommittee was concocted by petitioner and related by him at petitioner's direction (R. 501).

ARGUMENT

1. Petitioner contends (Pet. 2, 12-13, 16-17, 22, 37-40) that perjury before a Congressional commit-

tee is a matter of national concern. He cites *Johnson* v. *United States*, 225 U. S. 405, to the effect that in cases of this kind the provisions of the District of Columbia Code were superseded by the adoption of the Federal Criminal Code. He argues that the proceeding against him was therefore fatally defective, since the indictment was brought under the provisions of the District of Columbia Code. The Court of Appeals rejected the contention, relying on two of its earlier decisions, *O'Brien* v. *United States*, 99 F. 2d 368, and *Behrle* v. *United States*, 100 F. 2d 714.

Regardless of whether petitioner is right in his contention that crimes of this nature should be indicted under the federal statute,[1] it does not follow that the error, if any, vitiates his conviction. The two statutes, federal and local, are substantially identical with the exception of the penalty provisions. The language of the indictment conforms to the rule requiring "a plain, concise and definite written statement of the essential facts constituting the offense charged,"[2] and it clearly states an offense within the federal statute. The only indication that the prosecution was brought under the local statute lies in the citation of that statute in the caption of the indictment (R. 2). A miscitation of

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[1] In the *Johnson* case, as petitioner points out (Pet. 39-40), the Government conceded as much. See *Johnson* v. *United States*, 225 U. S. 405, 413, and see the Government's brief in that case, No. 1075, O. T. 1911, at p. 10.

[2] See Rule 7(c), F. R. Crim. P.

the applicable statute in the caption is, of course, not ground for reversal unless prejudice is shown.[3] There was no prejudice. Petitioner was fully informed of the charge. The trial would have been conducted in the same manner, regardless of the citation given in the indictment. And the trial judge imposed a sentence within the maximum allowable under either the federal statute or the District of Columbia perjury statute (R. 391-392.)[4]

2. Petitioner contends that the subcommittee was not validly constituted and that consequently Lamarre could not have been guilty of perjury before it. He argues, first, that there was not a quorum on October 6, 1947, when Lamarre made his second appearance, because only two of the five members were present (Pet. 8-9, 29-30). The Court of Appeals agreed with petitioner in this (R. 568), but, we think, erroneously. Under the Constitution, the Senate has the right to determine its own rules. Art I, §5, cl. 2; and see *United States* v. *Smith*, 286 U. S. 6, 33; *United States* v. *Ballin*,

[3] Rule 7(c), F. R. Crim, P., provides in part: "Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice." See also *Williams* v. *United States*, 168 U. S. 382, 389; and *United States* v. *Hutcheson*, 312 U. S. 219, 229.

[4] Despite petitioner's statement to the contrary (Pet. 12-13), we are unable to find anything in the record to indicate that the question of the applicability of the federal statute was ever called to the attention of the trial judge. The motion to dismiss the indictment apparently was based on the contention that the local statute did not apply because a Congressional committee is not a "tribunal" (R. 7-10).

144 U. S. 1, 4. The Standing Rules of the Senate provide that the standing committees may fix for themselves the number required to constitute a quorum, provided it is not less than one-third of the entire membership.[5] The Government originally confined its evidence to Lamarre's testimony on October 4, 1947, when a majority of the subcommittee was present (R. 20-40). It was defense counsel who first brought out evidence that Lamarre reappeared before the subcommittee on October 6, 1947, and that only two senators were present at the time (R. 52-53), but counsel made no effort to discover whether two members were sufficient to constitute a quorum. In fact, his first reference to the matter appears to have been in his requests for instructions (R. 360-361). For all we know from the record, two members were sufficient. In these circumstances, and in view of the strong presumption of regularity in official action, we think it does not now lie with petitioner to challenge the validity of the meeting of October 6 in this respect.[6]

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[5] Rule XXV, 3, Standing Rules of the Senate. The House apparently follows a different practice. See Willoughby, *Principles of Legislative Organization and Administration* (1934), 363-366.

[6] In *Sinclair* v. *United States*, 279 U. S. 263, 296, this Court held that the presumption of innocence was stronger than the presumption of regularity when the issue was whether the questions asked a witness by a Senate committee were pertinent to any inquiry the committee was authorized to make. We think that decision is clearly distinguishable, for the matter was essential to the Government's case, whereas here the testimony given by Lamarre on October 4, 1947, was sufficient

Petitioner also contends that there was not a quorum present at the October 4 meeting. His argument runs as follows: the special committee as originally created in 1941 was composed of seven Senators; later in 1941 the membership was increased to ten; in the resolutions renewing the authority of the committee in later Congresses, no reference was made to the resolution which increased the membership to ten, and therefore the membership reverted to seven; two of the members of the subcommittee who sat on October 4 were appointed members of the special committee at a time when that committee already had its full quota of seven members; consequently, they were not validly members of the committee and could not be counted toward a quorum of the subcommittee (Pet. 2, 9-12, 16, 21-22, 30-33). The contention is obviously without merit. The special committee as originally created in the 77th Congress was a continuing one,[7] authorized to sit during "the Seventy-seventh and succeeding Congresses" (R. 112-113). The resolutions in the three succeeding Congresses, referred to by petitioner (R. 105-111, 333-340), continued the "authority" of the committee, but had nothing to do with its composition. To argue, from the mere fact of the failure in the

to establish the Government's case and no evidence of the events of October 6 appeared in the record until defense counsel introduced the subject.

[7] There is nothing in *Sinclair* v. *United States*, 279 U. S. 263, 295-296, cited by petitioner (Pet. 32), to indicate that Congress has no power to create such a continuing committee.

succeeding Congresses to mention the resolution raising the membership to ten, that the intent was to reduce it to seven is frivolous, especially in view of the fact that the presiding officer of the Senate, with the full knowledge of that body, continued during the succeeding Congresses to maintain the membership at ten by filling vacancies as they occurred (R. 335-340).

Petitioner's final contention on this phase of the case is that the subcommittee was invalidly constituted because it was created by the chairman of the full committee without authority of the committee (Pet. 2, 10, 14-16, 21-22, 33-37). But there was evidence that the full committee had authorized its chairman to appoint subcommittees (R. 45-49, 54, 83-84); that this particular subcommittee had been appointed by the chairman at a regular meeting of the full committee on April 19, 1947 (R. 81-82, 86); that the full committee had full knowledge of the functioning of the subcommittee (R. 76); and that it is an invariable custom in the Senate for committee chairmen to appoint subcommittees without any committee action whatever (R. 74, 82, 83, 87, 92-93). This Court has held that the courts may not interfere with Congressional rules of procedure unless they exceed constitutional restraints or violate fundamental rights. *United States* v. *Smith,* 286 U. S. 6, 33; *United States* v. *Ballin,* 144 U. S. 1, 5. Petitioner does not suggest any way in which his fun-

damental rights were violated by the manner in which the subcommittee was created.

3. Petitioner does not deny that Lamarre, at his behest, lied to the subcommittee. But, resting upon the dissenting opinion in the court below, he contends that the evidence was insufficient to prove the exact offenses alleged in the indictment (Pet. 2, 13-14, 22-23, 41).

The second count of the indictment, by reference to the first, alleged that Lamarre told the subcommittee that petitioner was not financially interested in the Aviation Electric Corporation during any of the years from 1940 to 1947, inclusive (R. 3-4). The dissenting judge below, noting that the proof showed that Lamarre actually told the subcommittee that petitioner was a large creditor until some time in 1942, concluded that the Government had failed to prove that Lamarre said what the indictment alleged he said (R. 577-580). But, conceding that a creditor in petitioner's position has a "financial interest," it cannot be doubted that Lamarre told the subcommittee, in substance,[8] that petitioner had no financial interest whatever in the corporation in any of the years following 1942, for he stated that petitioner disposed of all of his stock in 1940 and received full payment of his loans in 1942, and, though he was examined closely as to

[8] The indictment need not set forth the alleged false matter expressly. The substance of it is sufficient. 2 Wharton, *Criminal Law* (12th ed. 1932), §§ 1563-1564.

the corporation's affairs, he would not admit any further financial connection between it and petitioner (*supra,* pp. 5-7). We think this constituted sufficient proof of the matter alleged. One of the technical aspects of a perjury indictment is the "assignment," by which, after the testimony given under oath has been set forth, the indictment is required to state, specifically and distinctly, those parts of it which were false. 2 Wharton, *Criminal Law* (12th ed. 1932), § 1566; 2 Chitty, *Criminal Law* (1847) 311. Several assignments can be included in one count and proof of the falsity of any one of these is sufficient for conviction. 2 Wharton, *Criminal Law* (12th ed. 1932), § 1567. Consequently, it is unnecessary to prove that the defendant said all he is alleged to have said: "* * * if any material assignment be adequately proved, it is enough to support the indictment, if falsity be satisfactorily shown." 2 Wharton, *Criminal Law,* (12th ed. 1932) § 1582. In this case, the indictment charged that Lamarre testified falsely that there was no financial connection between petitioner and the corporation in any of the years from 1940 to 1947. Perhaps under former technical requirements the Government should have set up a separate assignment of falsity as to each of the years involved. But under the new Rules of Criminal Procedure, perjury indictments need no longer conform to the old technical requirements. *United States* v. *Bickford,* 168 F. 2d 26 (C.A. 9). We

think that in a case of this kind the indictment may properly group all the years in one assignment. Proof, then, as there indubitably was, that Lamarre had falsely denied any connection between petitioner and the corporation with respect to any one of the years specified in the indictment was sufficient to support the conviction, and it was not necessary, as the dissenting judge below thought, for the Government to prove all that Lamarre was alleged to have said.

The second count is alone sufficient to support the judgment of conviction, since petitioner received a general sentence which was within the limit which could have been imposed on any one of the counts. *Pinkerton* v. *United States,* 328 U. S. 640, 641-642; *Hirabayashi* v. *United States,* 320 U. S. 81, 85. Each of the other two counts, however, equally supports the judgment and we will show that the convictions on the other two counts are equally valid.

The fourth count alleged that Lamarre falsely told the subcommittee that a Cadillac car was purchased for the use of the corporation (R. 4-5). The dissenting opinion below, after reviewing the testimony given by Lamarre on October 6, 1942 (*supra,* pp. 7-8), states that it could not be determined with certainty whether Lamarre told the subcommittee that the car was purchased for the use of the corporation or for the use of petitioner, and concludes that a conviction for perjury could not be supported on such uncertain evidence (R.

580-582). But the dissenting judge appears not to have noticed Lamarre's testimony on October 6 that the car belonged to the corporation and that he and Curnutt were the only corporate officers authorized to use it. In any event, during his earlier testimony as to the car on October 4, Lamarre stated flatly that "It was the company car" and that he had used it as the company car (R. 237-238). We submit that the clear purport of Lamarre's testimony is that the car was purchased for the company's use.

The sixth count charged that Lamarre falsely testified before the subcommittee that payment for the cost of redecorating petitioner's apartment was a gift from himself, whereas in truth he knew that it had been made "out of the funds" of the corporation (R. 5-7). The dissenting judge below, noting that Lamarre actually told the subcommittee that payment had been made by company checks, though charged to his salary account, concludes that, literally, payment was made "out of the funds" of the company. The dissent then goes on to hold that Lamarre told the subcommittee what the indictment says was the truth, and that the indictment does not, therefore, raise an issue as to who actually stood the cost as between Lamarre and the company (R. 582-584). We think this is an exceedingly strained interpretation of the indictment. While the expression, "paid for out of the funds of" the corporation, may be ambiguous standing by itself,

the clear meaning of the indictment is that the company had stood the cost, and not simply that company checks, charged to his account, had been used by Lamarre. Furthermore, contrary to the view of the dissenting judge, the record is clear that the transaction concerning the redecorating which Lamarre described to the subcommittee, was legally a gift, though Lamarre endeavored to avoid that characterization (*supra*, pp. 8-9).

4. At the trial the first witness for the prosecution was William P. Rogers, who, as counsel for the subcommittee, had conducted the examination of Lamarre on October 4 and October 6, 1947. Over objection, this witness was permitted to state in substance the testimony Lamarre had given before the subcommittee in so far as it was pertinent to the charges of the indictment (R. 35-40). A copy of the transcript of Lamarre's testimony was furnished to defense counsel at the outset of this part of the examination of Rogers, and counsel thereafter based a large part of his cross-examination of the witness upon it (R. 35-37, 42-44, 50-51, 58-71). Later the transcript of Lamarre's testimony was put in evidence by the Government (R. 94). Petitioner contends (Pet. 2, 4-6, 18, 20-21, 23-25), and the dissenting judge below thought (R. 571-577), that it was a violation of the best evidence rule to permit these summations by the committee counsel when the stenographer's transcript was

available, and that the procedure was so unfair and prejudicial as to constitute reversible error.

The matter to be proved at the trial was what Lamarre had *said* before the subcommittee. The majority opinion below points out that the argument of the dissent is based upon a misconception of the best evidence rule, which is limited in its application in the federal courts to cases in which the contents of a *writing* are to be proved (R. 569-571). The dissent admits that this is true of the federal courts, cites numerous cases to show that it is generally true in the state courts also, and admits that on this very point, i.e., admission of the testimony of an eye-witness when a transcript is available, the authority is all against application of the best evidence principle. However, the dissenting judge argues that the rule has become outmoded by the scientific development of stenographic reporting and that it should, therefore, be changed. (R. 574-577.) Whatever may have been the early breadth of the best evidence rule, it long ago came to be strictly limited in the manner set forth in the majority opinion,[9] and, as Wigmore points out, the extension advocated by the dissenting judge is an innovation which the courts have frequently discouraged. 4 Wigmore, *Evidence* (3d ed. 1940), § 1330. We submit that there is a clearly defined and substantial basis for the limitation on the rule as

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[9] See quotation from Thayer in 4 Wigmore, *Evidence* (3d ed. 1940), § 1173; cf. also §§ 1174, 1177-1250.

it presently exists. Where there is question of proving the contents of a document, the document itself is the primary evidence of its contents, and in the nature of things must always be the best evidence obtainable. But where testimony is to be proved, the stenographer's transcript is after all only one of various means of proving what was said, and is not always and of its very nature the best evidence,[10] for it cannot reproduce the inflections and demeanor of the witness. In our opinion, there is no reason to change the long established and generally recognized rule.

The dissenting judge also thought it unfair to permit the witness Rogers to give a summation of Lamarre's testimony before the transcript was read to the jury (R. 571-574). The basis for this argument is that Rogers' summation was really an interpretation of what Lamarre said, designed to fit the terms of the indictment. A reading of Rogers' summations demonstrates that they were an accurate statement of the substance of Lamarre's testimony.

5. Petitioner also insists that he was deprived of a fair trial by the opening statement and closing argument of the prosecution and by the court's charge (Pet. 2, 6-8, 17, 25-29). The challenged

[10] In the present record, for example, the transcript gives the answer of the witness, Rogers, to an important question as follows: "They always are?" (R. 44.) The question mark is probably a mistake, but we cannot be certain as the transcript stands. The best evidence here would be the testimony of the bystanders who heard the witness.

passages in the opening statement (R. 362-363) were not objected to, and were at most "minor aberrations" in a prolonged trial. *United States* v. *Socony Vacuum Oil Co.,* 310 U. S. 150, 237-243. The statements in the closing argument to which objection is made (R. 363-364) were made in response to argument by defense counsel and were in no way improper. The charge of the court, when read as a whole, fairly presented the issues of the case (R. 364-380). We see nothing in petitioner's strictures on the charge requiring extended answer on our part. The majority in the court below found nothing in this portion of petitioner's argument meriting discussion (R. 569), and the dissenting judge, who dealt exhaustively with other points, had no fault to find in this respect.

CONCLUSION

The decision of the Court of Appeals is correct and no conflict of decisions is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
JOSEPH M. HOWARD,
Attorneys.

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